

1997

# Foreword--Fiburn's Forgotten Footnote--Of Farm Team Federalism and Its Fate

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## Recommended Citation

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## Foreword

### ***Filburn's Forgotten Footnote— Of Farm Team Federalism and Its Fate***

**Jim Chen\***

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#### **I. THE MINNEAPOLIS MANIFESTO**

What is America's true national pastime, baseball or boondoggles? Many cities and states no longer need to choose. They have both. Buffeted by market forces that tilt athletic talent and titles toward larger cities,<sup>1</sup> state and local governments are stretching their budgets and their legal imaginations in an effort to retain or attract sports teams. Direct grants and a dazzling array of bonds and tax preferences are building new

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1. See Kevin E. Martens, *Fair or Foul? The Survival of Small-Market Teams in Major League Baseball*, 4 MARQ. SPORTS L.J. 323 (1994); Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57 (1997).

stadiums all over. To some, multiplier effects and intangible benefits merit public investment in major league sports. For boosters, the exodus of professional sports marks the beginning of irreversible urban decay. As Hubert Humphrey reputedly said, Minneapolis without the Minnesota Twins would become a "cold Omaha."<sup>2</sup> Opponents argue that public money should buy things besides luxury skyboxes. Vehement opposition to public investment in sports cathedrals has produced a new battle cry: "Separation of sports and state!"<sup>3</sup>

For a sport that is "not a subject of [interstate] commerce,"<sup>4</sup> major league baseball has figured prominently in a torrid constitutional debate. The struggle for sports subsidies is merely one manifestation of the race among state and local governments to finance favored businesses. In 1994, voices from a Minneapolis-based institution entered the debate. The institution was neither church nor state, but an organization that blends elements of both and arguably affects more lives than either: a Federal Reserve Bank. In the 1994 report of the Federal Reserve Bank of Minneapolis,<sup>5</sup> Melvin Burstein and Arthur Rolnick decried the

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2. See, e.g., Patrick Reusse, *We'd Be Idiots to Pass Up Chance at an NHL Team*, STAR-TRIB. (Minneapolis), Oct. 12, 1995, at 4C; cf. Paul Klauda, *Census Bureau Finds Fewer Twin Cities Noses*, STAR-TRIB. (Minneapolis), Nov. 22, 1989, at 1B (noting that 1988 Census Bureau estimates had placed Omaha ahead of Minneapolis in population). Des Moines has displaced Omaha as the butt of sports jokes in Minnesota. See, e.g., Joe Soucheray, *Arne Double Dribbles on Gopher Game Day*, ST. PAUL PIONEER PRESS, Feb. 19, 1997, at 1B (quoting Minnesota Gov. Arne Carlson's opinion of Des Moines, expressed on the eve of a basketball game between the Universities of Minnesota and Iowa: "It's dead, . . . absolutely dead."). Lest some readers swoon from Nebraskan or Iowan pride, one should remember that it would be truly insulting to describe Omaha or Des Moines as a "warm Saint Paul."

3. See, e.g., Barry M. Bloom, *Public Speaks Up on Baseball-Only Stadium Issue*, SAN DIEGO UNION & TRIB., June 24, 1997, at B1; Letters to the Editor, PITTSBURGH POST-GAZETTE, June 16, 1997, at A10 ("Separation of sports and state looks like a good idea."); Letters from Readers, STAR-TRIB. (Minneapolis), May 19, 1997, at 12A ("I would like to propose an amendment to the U.S. Constitution that ensures the separation of sports and state."); Letters, CHI. SUN-TIMES, June 14, 1990, at 40 ("[T]he real issue we face is developing a separation between 'sports and state.' When did government get into the sports business?").

4. *Federal Baseball Club v. National League*, 259 U.S. 200, 208 (1922); accord *Flood v. Kuhn*, 407 U.S. 258, 284 (1972).

5. Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, THE REGION, March 1995, at 3 (quarterly journal of the Federal Reserve Bank of Minneapolis), reprinted in Melvin Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, 10 STATE TAX NOTES 1895 (1996). Subsequent citations to this source will refer to the version in *State Tax Notes*.

proliferation of subsidies and tax preferences designed to lure or retain employers ranging from "airline maintenance facilities, automobile assembly plants, and professional sports teams to . . . chopstick factories and corn processing facilities."<sup>6</sup> This report, notorious enough to be called the "Minneapolis Manifesto," argued that local business incentives destroy more wealth than they create, not only by diverting scarce fiscal resources, but also by distorting private investment decisions.<sup>7</sup> Furthermore, Burstein and Rolnick placed no confidence in the Supreme Court's ability to stop this corrosive competition.<sup>8</sup> Instead, they urged "Congress, with its sweeping constitutional powers, . . . to end this economic war among the states."<sup>9</sup>

The Manifesto inspired not one but two academic conferences. The first, held on May 21-22, 1996, in Washington, D.C., addressed Burstein and Rolnick's specific recommendations.<sup>10</sup> On May 2-3, 1997, the Minneapolis Fed and the University of Minnesota Law School cosponsored a second conference, with the expanded theme of "The Law and Economics of Federalism." This Symposium publishes five of the papers presented at that conference.

Part II of this foreword revisits the legal milieu in which the Minneapolis Manifesto emerged. Since the pivotal year of 1994, the Supreme Court's case law on federalism has exploded. Part III places the Symposium within this jurisprudential context. Parts IV and V offer some preliminary (and surely premature) thoughts on economic analysis of federalism. Federalism, the "oldest question of [American] constitutional law,"<sup>11</sup> the prime mover in a system where nearly every constitutional case "is a case about federalism,"<sup>12</sup> defines the newest legal challenges in a mercilessly competitive global economy.<sup>13</sup> In a world where virtually every legal endeavor is transforming

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6. Burstein & Rolnick, *supra* note 5, at 1895.

7. *See id.* at 1896-98.

8. *See id.* at 1898-99.

9. *Id.* at 1900.

10. *See generally The Economic War Among the States*, THE REGION, June 1996, at 1 (reporting the proceedings of the Washington conference).

11. *New York v. United States*, 505 U.S. 144, 149 (1992); *see also* H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993).

12. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

13. *See generally* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994).

"from a strictly local undertaking into a global commitment,"<sup>14</sup> one must strain to find "any subject that [is] effectively controlled by a single national sovereign."<sup>15</sup> Part IV revisits that *cause célèbre* of commerce clause jurisprudence, *Wickard v. Filburn*.<sup>16</sup> A forgotten footnote in *Filburn* offers a novel perspective on federalism. Part V anticipates what *Filburn's* forgotten footnote might teach us about the fundamental nature of the state.

## II. NINETEEN NINETY-FOUR

### A. MY FAVORITE YEAR

*Annus mirabilis* to some,<sup>17</sup> *annus horribilis* to others,<sup>18</sup> 1994 was a year of "[s]trange portents" for federalism around the world.<sup>19</sup> The North American Free Trade Agreement (NAFTA) took effect on January 1.<sup>20</sup> Austria, Finland, and Sweden joined the European Union, while Norway declined the invitation to push Europe further toward political integration.<sup>21</sup> Diplomats in Marrakesh on April 15 witnessed the birth of the World Trade Organization, the most significant step toward global free trade in five decades.<sup>22</sup> Even legal scholars com-

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14. Jim Chen, *Fugitives and Agrarians in a World Without Frontiers*, 18 CARDOZO L. REV. 1031, 1051 (1996).

15. John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 25 (1996).

16. 317 U.S. 111 (1942).

17. Cf. Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 695 & n.1 (1996) (reminiscing about a year of miracles "roughly [b]etween the end of the Chatterley ban [a]nd the Beatles' first LP" (quoting PHILIP LARKIN, *Annus Mirabilis*, in COLLECTED POEMS 167, 167 (Anthony Thwaite ed., 1988))).

18. Cf. M.D.A. Freeman, *Annual Survey of Family Law 1992 England: 1992 as Annus Horribilis*, 32 U. LOUISVILLE J. FAM. L. 293, 293 (1993-94) ("As is well-known, the Queen described 1992 as her 'annus horribilis.'").

19. ROBERT GRAVES, *CLAUDIUS THE GOD* 417 (Penguin 1954).

20. North American Free Trade Agreement, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 605 (1993).

21. See Treaties & Final Acts, June 24, 1994, E.U. BULL., no. 6, at 86 (1994) (enabling Austria, Finland, Norway, and Sweden to join the European Union). See generally Dierk Booss & John Forman, *Enlargement: Legal and Procedural Aspects*, 32 COMMON MKT. L. REV. 95 (1995); Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092 (1995).

22. Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, reprinted in WORLD TRADE ORGANIZATION, THE RESULTS OF

memorated these cataclysmic coincidences, comparing American federalism with its European<sup>23</sup> and GATT<sup>24</sup> analogues. Menaced simultaneously by decentralization and globalization, the nation-state seemed on the verge of losing its longstanding legal primacy.<sup>25</sup> "Prodigies enough, soothsayers?"<sup>26</sup>

This season of legal change also swept through the United States. Stressing the devolution of power to the states, Republicans won control of both houses of Congress for the first time in four decades. Still hot from a 1992 decision that resuscitated the moribund Tenth Amendment,<sup>27</sup> the Supreme Court agreed to review a Commerce Clause challenge to a federal ban on gun possession near schools.<sup>28</sup> That grant of certiorari forebode an aggressive assault on federal authority. In each of the three Terms beginning with October Term 1994, the Court would invalidate acts of Congress on federalist grounds. In the 1994 Term, *United States v. Lopez*<sup>29</sup> struck down the Gun-Free School Zones Act of 1990. The next Term, the Court held that the Commerce Clause gave Congress no power to abrogate the

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THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 5 (GATT Secretariat 1995) [hereinafter URUGUAY ROUND]; cf. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947].

23. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 403-56 (1994); see also George A. Bermann, *Subsidiarity and the European Community*, 17 HAST. INT'L & COMP. L. REV. 97, 98 (1993); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831-33 (1996). See generally Jenna Bednar et al., *The Politics of European Federalism*, 16 INT'L REV. L. & ECON. 279 (1996).

24. See, e.g., Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1411-31 (1994); see also Friedman, *supra* note 13 (discussing GATT's impact on the United States).

25. See generally Symposium, *The Decline of the Nation State and Its Effects on Constitutional and International Economic Law*, 18 CARDOZO L. REV. 903 (1996).

26. GRAVES, *supra* note 19, at 418.

27. See *New York v. United States*, 505 U.S. 144, 174-77 (1992) (striking down the "take title" provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985); cf. Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1988 (1993) ("*New York v. United States* is fascinating precisely because New York would have complied with congressional commands to regulate waste had the Court ordered New York to do so.").

28. See *United States v. Lopez*, 511 U.S. 1029 (1994), *granting cert. to* 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

29. 514 U.S. 549, 567-68 (1995).

sovereign immunity of the states under the Eleventh Amendment.<sup>30</sup> Finally, in the 1996 Term, the Court held that Congress could not order state and local executive officers to enforce federal gun control legislation.<sup>31</sup> Three Terms, three eviscerated acts of Congress. The centrifugal portents of 1994 had proved true.

Nevertheless, the death of nationalism in America is vastly overstated. American federalism has proved supple enough to meet its latest constitutional crises. Not quite a month after deciding *Lopez*,<sup>32</sup> the Court repelled an effort to impose state-law term limits on members of Congress.<sup>33</sup> In more transparently economic cases, the Court has reaffirmed its own prerogative to invalidate local laws. With an almost casual disregard for the shadows it has cast on Congress's affirmative power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes,"<sup>34</sup> the contemporary Court has sustained, even strengthened, its dormant Commerce Clause jurisprudence. These decisions have vindicated James Madison's belief that the interstate Commerce Clause was principally as "a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government."<sup>35</sup>

Dormant Commerce Clause decisions provide the ideal laboratory for an economically literate analysis of federalism. These cases supply not only compelling facts but also doctrinal stability. Two decades have passed since the fateful day in 1976 when the Supreme Court decided both *Hughes v. Alexandria Scrap Corp.*<sup>36</sup> and *National League of Cities v. Usery*.<sup>37</sup> A careless observer might have been tempted to ignore *Hughes* and regard *Usery* as the more enduring expression of American federalism. Twenty-one years of legal hindsight suggest oth-

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30. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131-32 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

31. See *Printz v. United States*, 117 S. Ct. 2365 (1997).

32. See *Lopez*, 514 U.S. at 549 (decided April 26, 1995).

33. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827, 836 (1995) (decided May 22, 1995).

34. U.S. CONST. art. I, § 8, cl. 3.

35. James Madison, Letter to J.C. Cabell (Feb. 13, 1829), reprinted in 3 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911); accord *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 n.9 (1994).

36. 426 U.S. 794 (1976).

37. 426 U.S. 833 (1976). *Hughes* and *Usery* were both decided on June 24, 1976.

erwise. Although the market-participant doctrine established by *Hughes* has flourished,<sup>38</sup> *Usery* was unceremoniously dumped within a decade as "unsound in principle and unworkable in practice."<sup>39</sup> Complain as we might about the "quagmire" of dormant Commerce Clause cases,<sup>40</sup> the doctrine has rested on relatively firm constitutional ground.

Therefore, when dormant Commerce Clause doctrine visibly shifts, the change is as noteworthy as any seismic shift. Perhaps more so than any other recent year, 1994 exposed the fault lines in this body of cases. No other constitutional provision carried greater weight than the dormant Commerce Clause.<sup>41</sup> In that year of legal wonders, the Court invalidated four state laws on this basis.<sup>42</sup> Two of these cases, *Associated Industries v. Lohman*<sup>43</sup> and *Oregon Waste Systems, Inc. v. Department of Environmental Quality*,<sup>44</sup> applied the basic principle that facial discrimination against interstate commerce is well-nigh per se unconstitutional.<sup>45</sup> These cases' relative simplicity emerges

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38. See *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 206 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Alliance for Clean Coal v. Miller*, 44 F.3d 591, 597 (7th Cir. 1995); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903, 910 (3d Cir. 1990), cert. denied, 501 U.S. 1212 (1991). See generally Thomas K. Anson & P.M. Schenkan, *Federalism, the Dormant Commerce Clause, and State Owned Resources*, 59 TEX. L. REV. 71 (1980); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

39. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). See generally, e.g., Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623 (1994).

40. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); accord, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia, J., concurring in the judgment).

41. See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1461 (1995) (noting that the Court's "activist record" that Term gave the dormant Commerce Clause as an "implicit constitutional provision greater bite . . . than any of the provisions (including the individual rights provisions) explicitly set forth in the Constitution").

42. In October Term 1993, the Court rejected dormant Commerce Clause claims in two cases. One of them, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), will be discussed shortly. In the other case, *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994), the Court rested its rejection of the dormant Commerce Clause claim at issue, see *id.* at 373-74, entirely upon a previous case involving similar airport taxes, see *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).

43. 511 U.S. 641 (1994).

44. 511 U.S. 93 (1994).

45. See *Lohman*, 511 U.S. at 649-50; *Oregon Waste Systems*, 511 U.S. at 99; cf. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (stating a



from a comparison with another dormant Commerce Clause case decided that Term, *Barclays Bank PLC v. Franchise Tax Board*.<sup>46</sup> *Barclays* overturned a foreign taxpayer's objection to California's facially nondiscriminatory tax-accounting system. Although California's worldwide combined reporting scheme was inconsistent with the federal government's method for taxing foreign source income and exposed some taxpayers to multiple taxation, the Court was willing to tolerate both of these alleged shortcomings.<sup>47</sup> By contrast, the states in *Lohman* and *Oregon Waste Systems* subjected out-of-state taxpayers to facially discriminatory taxes. The Court held that these states had failed to justify the discrimination by reference to special burdens imposed uniquely by out-of-staters or by interstate commerce.<sup>48</sup> Read together, *Lohman*, *Oregon Waste Systems*, and *Barclays* stand for three unexceptional principles. First, states bear the burden of justifying facial discrimination against out-of-staters. Second, taxpayers bear the burden of proving that a facially neutral law cripples interstate commerce. Third, these burdens are quite difficult in practice to discharge. Such are the basic ground rules for reconciling local public finance with constitutional protection of interstate and international commerce.<sup>49</sup>

But the Court in 1994 handed down two landmark decisions on state-law subsidies that were more or less transparently designed to aid local businesses. The Court was far too modest in describing *C & A Carbone, Inc. v. Town of Clarkstown*<sup>50</sup> as "a small new chapter in [the] course of [its] decisions" on "waste transfer and treatment" and a routine application of "well-settled principles of [its] Commerce Clause jurisprudence."<sup>51</sup>

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"virtually *per se* rule" invalidating statutes that facially discriminate against interstate commerce); *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996) (same).

46. 512 U.S. 298 (1994).

47. See *id.* at 312-14 (finding that the state did not impose inordinate compliance burdens on foreign taxpayers).

48. See *Lohman*, 511 U.S. at 648-49; *Oregon Waste Systems*, 511 U.S. at 103-04.

49. For the factors that the Court considers when reviewing taxes that affect foreign commerce, see *Barclays*, 512 U.S. at 311, 317, 320; *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 72 (1993); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 185-89 (1983); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-49 (1979).

50. 511 U.S. 383 (1994).

51. *Id.* at 386. For waste disposal cases predating *Carbone*, see *Oregon Waste Systems, Inc. v. Department of Env'tl. Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504

In *Carbone*, a New York town sought to finance a \$1,400,000 solid waste transfer station by guaranteeing a five-year flow of garbage—and profits—to a local private contractor.<sup>52</sup> The town adopted an ordinance directing all nonhazardous solid waste to this transfer station. “[A]s the most candid of *amici* and even Clarkstown [itself] admit[ted], the flow control ordinance [was] a financing measure.”<sup>53</sup> Three dissenting Justices approved this use of local police power to “satisfy[] a traditional governmental responsibility” without conferring an undue “benefit on a class of local private actors.”<sup>54</sup> According to them, the ordinance was indeed “a way to finance a public improvement,” but one that lawfully spread costs “among . . . local generators of trash.”<sup>55</sup> A majority of five, however, condemned “the flow control ordinance [as] just one more instance of local processing requirements that we long have held invalid,”<sup>56</sup> as another protectionist measure “hoard[ing] a local resource . . . for the benefit of local businesses.”<sup>57</sup> Rarely has the line between the benign and the benighted divided the Court so sharply.

Even more extraordinary was *West Lynn Creamery, Inc. v. Healy*.<sup>58</sup> Alarmed by its loss of market share to dairy farmers in neighboring states, Massachusetts adopted an emergency milk pricing order that taxed all wholesalers by volume and, critically, distributed the impounded funds to Massachusetts producers.<sup>59</sup> Like a patently unlawful tariff on imported milk, the Massachusetts pricing order had the “avowed purpose

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U.S. 353 (1992); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

52. *Carbone*, 511 U.S. at 387.

53. *Id.* at 393; cf. *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 657 (3d Cir. 1997) (“Garbage . . . carries substantial value for those with the desire or know-how to dispose of it.”).

54. *Carbone*, 511 U.S. at 411 (Souter, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting).

55. *Id.*; cf. *Ben Ohrleins & Sons & Daughters v. Hennepin County*, 115 F.3d 1372, 1379-80 & n.7 (8th Cir. 1997) (recognizing that the financial burden of flow control falls partly on waste generators in the form of elevated tipping fees); *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1387 (8th Cir. 1993) (same).

56. 511 U.S. at 391.

57. *Id.* at 392. Justice O'Connor stood alone in condemning Clarkstown's flow control ordinance, “not because of facial or effective discrimination against interstate commerce, but rather because it impose[d] an excessive burden on interstate commerce.” *Id.* at 401 (O'Connor, J., concurring in the judgment).

58. 512 U.S. 186 (1994).

59. See *id.* at 189-91.

and . . . undisputed effect [of] enabl[ing] higher cost Massachusetts dairy farmers to compete with lower cost dairy farmers in other States."<sup>60</sup> The pricing order resembled "a broad-based tax on a single kind of good," coupled with "special provisions for in-state producers."<sup>61</sup>

The Massachusetts pricing order combined two measures: an across-the-board tax on a commodity (milk), and a direct subsidy for certain in-staters (dairy farmers). Noting that each measure, standing alone, is traditionally considered constitutional, the state defended its milk pricing order as a sound "combination of two independently lawful regulations."<sup>62</sup> The *West Lynn* Court delivered a crushing response. Recognizing that the subsidy would transform the mighty dairy lobby from a potential opponent to a vigorous supporter of the pricing order,<sup>63</sup> the Court reasoned that a program "conjoining a tax and a subsidy" would create a legal monster "more dangerous to interstate commerce than either part alone."<sup>64</sup>

The Court also unleashed a dictum arguably more significant than its holding. Despite assuming for the argument's sake that a state could draw a subsidy from general revenues, the Court dropped this bombshell of a footnote:

We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that "[d]irect subsidization of domestic industry does not ordinarily run afoul" of the negative Commerce Clause. In addition, it is undisputed that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes.<sup>65</sup>

This footnote, coupled with the further dictum that a "pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business[es],"<sup>66</sup> fueled the Minneapolis Manifesto. Burstein and Rolnick lost faith in a judicial resolution of the "economic war

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60. *Id.* at 194.

61. *Id.* at 196-97; *cf.* *New Energy Co. v. Limbach*, 486 U.S. 269, 280 (1988) (invalidating this sort of law); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (same); *I.M. Darnell & Son Co. v. City of Memphis*, 208 U.S. 113, 125 (1908) (same).

62. 512 U.S. at 198.

63. *See id.* at 200-01 & n.18.

64. *Id.* at 199-200.

65. *Id.* at 199 n.15 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)) (other citations omitted).

66. *Id.* at 199.

among the states."<sup>67</sup> "[I]f the Court were to consider the constitutional[]" question, they wrote, "one would expect it to hold that subsidies or preferential taxes impose no burden on interstate commerce."<sup>68</sup>

A close reading of *West Lynn* arguably supports a different interpretation. All four Justices outside the majority argued that the Court had "gratuitously cast[] doubt on the validity of state subsidies"<sup>69</sup> and "call[ed] into question many garden-variety state laws heretofore permissible."<sup>70</sup> One commentator agreed that *West Lynn* destabilized the constitutional status of state-law subsidies.<sup>71</sup> It bears remembering, however, that all nine Justices, merely a month before deciding *West Lynn*, had assumed that Clarkstown could have financed the waste transfer station in *Carbone* by imposing taxes or floating a bond.<sup>72</sup> In this light, perhaps the more accurate conclusion is that *West Lynn* "bolsters—rather than undermines—the view that state subsidies 'ordinarily' are constitutional."<sup>73</sup>

Moreover, the larger history of *West Lynn* counsels against too sanguine an expectation that Congress can and will end the economic war among the states. Eight weeks after the Supreme Court struck down Massachusetts' protectionist milk pricing order, the Senate Judiciary Committee approved a proposal to create a Northeast Interstate Dairy Compact,<sup>74</sup> under

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67. Burstein & Rolnick, *supra* note 5, at 1895.

68. *Id.* at 1899 (footnote omitted).

69. 512 U.S. at 213 (Rehnquist, C.J., joined by Blackmun, J., dissenting).

70. *Id.* at 209 (Scalia, J., joined by Thomas, J., concurring in the judgment).

71. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 443 (1996).

72. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) ("[T]he town may subsidize the facility through general taxes or municipal bonds."); *id.* at 405-06 (O'Connor, J., concurring in the judgment) ("[T]he town could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities."); *id.* at 428-29 (Souter, J., dissenting) (speaking of practical rather than constitutional "limits on any municipality's ability to incur debt or to finance facilities out of tax revenues"); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 112 F.3d 652, 665-66 (3d Cir. 1997) (detailing "several alternatives by which [a] State could . . . ensure the financial integrity of [its] local government entities" without relying on discriminatory flow control laws).

73. Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 840 (1996).

74. See S. REP. NO. 103-333 (1994) (accompanying S. 2069, 103d Cong. (1994)).

which a regional commission would deliver income support to dairy farmers throughout New England. Despite objections that the compact would effectively nullify *West Lynn* by insulating New England from the fiercely competitive national dairy market,<sup>75</sup> Congress codified the Northeast Interstate Dairy Compact as part of its 1996 overhaul of federal agricultural legislation.<sup>76</sup> However eager we might be to entrust the protection of domestic free trade to Congress, "the political reality . . . of mercantilism" shoves the responsibility back to the courts.<sup>77</sup>

By contrast, dormant Commerce Clause cases suggest that the Supreme Court is more willing than ever to review subsidies with a great sensitivity to real-world consequences. *West Lynn* contains a surprisingly trenchant analysis of client politics: "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy."<sup>78</sup> But even if the Justices are all realists now, to a great extent they remain formalists still. The academic recognition that tax expenditures are economically equivalent to direct subsidies<sup>79</sup> has yet to disturb the Court's distinction between "direct subsidization of domestic industry" and "discriminatory taxation."<sup>80</sup> Still, the distinction between direct disbursements and

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75. See *id.* at 33-34 (additional views of Sens. Kohl and Thurmond).

76. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 147, 110 Stat. 888, 919-20 (to be codified at 7 U.S.C. § 7256); see also Announcement of Implementation of the Northeast Interstate Dairy Compact, 61 Fed. Reg. 44,290 (Aug. 28, 1996) (announcing the authorization and implementation of the compact by Secretary of Agriculture Dan Glickman).

77. Farber & Hudec, *supra* note 24, at 1406.

78. 512 U.S. at 200. A similar degree of sophistication arguably underlies *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590 (1997), a 1997 decision invalidating a discriminatory property tax exemption for charitable institutions serving primarily in-state residents. Notably, Justice Stevens wrote both *West Lynn* and *Camps Newfound*.

79. See, e.g., *Tax Subsidies as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, Hearings Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm., 92d Cong., 1st Sess. 76-106 (1972) (statement of Stanley S. Surrey); Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

80. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); accord *Camps*

discriminatory taxes is not altogether vapid. Something in the political economy of public finance advises the Court as a rule to allow governments to "subsidize" favored projects "through general taxes or municipal bonds," but not to "employ discriminatory regulation" of the "open market."<sup>81</sup>

*Carbone* and *West Lynn* are harbingers of a robustly nationalistic policy on domestic free trade, given effect through the dormant Commerce Clause. It is all too fitting that local protectionism should spark a comprehensive reexamination of American federalism. Another economic war among the states, after all, was the impetus for union: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."<sup>82</sup>

The federal presence in 1994's dormant Commerce Clause cases counterbalances the Court's renewed willingness to scrutinize congressional statutes under the Commerce Clause. Although the Court has long taken a divided approach to parallel questions of federal and state legislative power,<sup>83</sup> the contrast between the Commerce Clause simpliciter and the dormant Commerce Clause continues to fascinate legal scholars.<sup>84</sup> In the popular legal imagination, the two sides of this Commerce Clause jurisprudence demonstrate the Court's ability to "hold[] two contradictory beliefs . . . simultaneously, and accept[] both

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*Newfound/Owatonna*, 117 S. Ct. at 1606.

81. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 393, 394 (1994); see also *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 98 (1984) (plurality opinion) ("There are sound reasons for distinguishing between a State's preferring its own residents in the initial disposition of goods when it is a market participant and a State's attachment of restrictions on dispositions subsequent to the goods coming to rest in private hands."); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 211 (1994) (Scalia, J., concurring in the judgment) (identifying a constitutionally significant "difference between assisting in-state industry through discriminatory taxation and assisting in-state industry by other means"); cf. *Enrich*, *supra* note 71, at 442 (distinguishing between tax expenditures as "characteristic exercise[s] of sovereign power" from "the state's proprietary participation in market transactions").

82. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring in the judgment); accord *Camps Newfound/Owatonna, Inc.*, 117 S. Ct. at 1595-96.

83. This tradition stretches at least as far back as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

84. See, e.g., *Bednar & Eskridge*, *supra* note 41, at 1460-61, 1463 ("Why should the Supreme Court be so active in reviewing state incursions on the federalist bargain, while remaining relatively passive in reviewing national incursions?").

of them."<sup>85</sup> Call it doublethink if you will, but the Justices are merely exercising an instinct that Justice Holmes undoubtedly would approve:

I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.<sup>86</sup>

*E pluribus unum*, and hallelujah.

## B. THE MINNESOTA SCHOOL OF FEDERALISM

The legal legacy of 1994 extends far beyond the Supreme Court. Quite ironically, it was a regional bank in the decentralized Federal Reserve System<sup>87</sup> that has organized this comprehensive analysis of business relocation subsidies. The weight of the legal scholarship, much of it written since 1994,<sup>88</sup> is converging with the economic literature<sup>89</sup> in condemning business handouts.

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85. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 215 (1949).

86. OLIVER WENDELL HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

87. See, e.g., 12 U.S.C. § 222 (1994) (dividing the country into no fewer than eight and no more than twelve geographically defined Federal Reserve Districts); *id.* § 241 (directing the President to exercise "due regard to a fair representation of the financial, agricultural, industrial and commercial interests, and geographical divisions of the country" and limiting any Federal Reserve District from having more than a single representative on the Board of Governors of the Federal Reserve System); HENRY PARKER WILLIS, *THE FEDERAL RESERVE SYSTEM: LEGISLATION, ORGANIZATION AND OPERATION* 561-97 (1923) (discussing the considerations that influenced the arrangement of the Federal Reserve Districts); Ralph Jay Wexler, Note, *Federal Control over the Money Market*, 1981 ARIZ. ST. L.J. 159, 176 (describing the "considerable autonomy" of the Federal Reserve Banks within "a decentralized system").

88. See, e.g., Christopher R. Drahozal, *On Tariffs v. Subsidies in Interstate Trade: A Legal and Economic Analysis*, 74 WASH. U. L.Q. 1127 (1996); Enrich, *supra* note 71; Hellerstein & Coenen, *supra* note 73; Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171 (1997); Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L.J. 101 (1995); Michael H. LaFave, Note, *Taking Back the Giveaways: Minnesota's Corporate Welfare Legislation and the Search for Accountability*, 80 MINN. L. REV. 1579 (1996); Mark Taylor, Note, *A Proposal to Prohibit Industrial Relocation Subsidies*, 72 TEX. L. REV. 669 (1994).

89. See, e.g., Dan A. Black & William H. Hoyt, *Bidding for Firms*, 79 AM. ECON. REV. 1249 (1989); Joseph M. Phillips & Ernest P. Goss, *The Effect of State and Local Taxes on Economic Development: A Meta-Analysis*, 62 S. ECON. J. 320 (1995). But see Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333 (1988) (concluding that economic competition across state lines is, on balance, healthy); Thomas J. Holmes, *The Effects of Tax Dis-*

This is not to suggest that the Supreme Court has consistently heeded pragmatic advice. If anything, the reverse is true. Heretofore its federalism cases have been strewn with useless abstractions and unsupported assertions. Justices of all persuasions have launched inflammatory rhetoric, with no evident ability to persuade. Just as the celebrants of localism draw cold comfort from the mantra that states may protect themselves through the "national political process,"<sup>90</sup> defenders of national supremacy dismiss the dogma that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front," such that "the promise of liberty" lies "[i]n the tension between federal and state power."<sup>91</sup> The combatants in this sterile debate "have worn deep grooves repeating the same basic arguments and counter arguments over and over."<sup>92</sup> If we are stuck with a literature that says so "[l]ittle on how federalism really works,"<sup>93</sup> the Justices are partly to blame.

Economic analysis of federalism has often drawn disdain from a Court that often retorts that "a law can be both economic folly and constitutional."<sup>94</sup> The Court's willful economic blindness is especially evident when it restrains Congress's commerce power. Thus *United States v. Lopez* voided a federal gun ban whose connection to interstate commerce was not visible to the naked judicial eye.<sup>95</sup> Justice Thomas went so far as to try to confine the meaning of "commerce" to the narrow, eighteenth century sense of "trade."<sup>96</sup> Similarly, Chief Justice

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crimination When Local Governments Compete for a Tax Base (1997) (unpublished manuscript, on file with author).

90. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985); *accord* *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

91. *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991); *accord, e.g.*, *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring); *see also* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (asserting that the federalism envisioned in the original Constitution gave "our citizens . . . two political capacities, one state and one federal, each protected from incursion by the other").

92. Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 159 (1994).

93. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1490 (1994).

94. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring in the judgment); *cf.* *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (consigning arguments over the "social utility" of contested lines of business "to the legislature, not to us").

95. *See Lopez*, 514 U.S. at 563.

96. *See id.* at 585-87 (Thomas, J., concurring); *cf.* *U.S. Term Limits, Inc.*



Rehnquist has categorically denied the usefulness of public choice theory: "Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them."<sup>97</sup> As Justice O'Connor announced recently while exhuming the Tenth Amendment, the drive to reassert the constitutional role of the states "would be the same even if one could prove that federalism secured no advantages to anyone."<sup>98</sup>

On the hundredth anniversary of his renowned speech at Boston University,<sup>99</sup> a symposium dedicated to economic analysis of constitutional law might more profitably invoke the Oliver Wendell Holmes of *The Path of the Law* than the Holmes of *Lochner v. New York*.<sup>100</sup> A full century after Holmes grudgingly conceded the temporary ascendancy of "the black-letter man" in "the rational study of the law," the tempests of legal realism, legal process, and critical legal studies permit us to salute Holmes's scholar "of the future": the student "of statistics and

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v. Thornton, 514 U.S. 779, 884-916 (1995) (Thomas, J., dissenting) (marshaling historical evidence in favor of an expanded role for state law in defining the qualifications of members of Congress).

97. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 215 (1994) (Rehnquist, C.J., dissenting); *accord id.* at 212 (Scalia, J., concurring in the judgment). *Compare id.* at 215 (Rehnquist, C.J., dissenting) (arguing that there were "still at least two strong interest groups opposed to the milk orders—consumers and milk dealers") with *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347-48 (1984) (denying consumers standing to challenge federal milk orders).

98. *New York v. United States*, 505 U.S. 144, 157 (1992); *cf. INS v. Chadha*, 462 U.S. 919, 959 (1983) ("[T]he Framers ranked other values higher than efficiency").

99. *See generally* Symposium, *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989 (1997). *See also* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 142 (1992) (arguing that *The Path of the Law* "pushed American legal thought into the twentieth century").

100. *Lochner v. New York*, 198 U.S. 45, 75 (1908) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."); *accord, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 424-25 (1994) (Souter, J., dissenting) (extending Justice Holmes's dictum about the fourteenth amendment to the Commerce Clause); *cf. Dean Milk Co. v. City of Madison*, 340 U.S. 349, 357 (1951) (Black, J., dissenting) (hinting that aggressive judicial review under the dormant Commerce Clause is the functional equivalent of substantive due process); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 788 & n.4 (1945) (Black, J., dissenting) (same); *id.* at 796 (Douglas, J., dissenting) (same). *But see* Farber & Hudec, *supra* note 24, at 1406 ("Free trade is a more tractable judicial goal than the typical *Lochnerian* standards of rationality or economic efficiency . . .").

the master of economics."<sup>101</sup> The Supreme Court has yet to fall irredeemably into the formalist pit; its most recent dormant Commerce Clause decision recognizes practical insights developed in the scholarship on local developmental subsidies.<sup>102</sup> Indeed, if there is any branch of constitutional law that emphasizes economic substance over legal form, it is the dormant Commerce Clause.<sup>103</sup>

The Court nevertheless displays a pronounced and oft-repeated disdain for economic analysis. Perhaps the advocates of a more realistic approach should turn the rhetoric of rabid federalism on its head. We in the provinces can tolerate only so much hot air from imperial Washington, and any further paeans to the virtues of regulatory entropy had better be backed with concrete facts and figures. Enough with fairy tale federalism; put up proof that it does us some good, any good, or shut up. Blind loyalty to "Our Federalism"?<sup>104</sup> Good-bye to all that.<sup>105</sup>

At the risk of engaging in some unseemly boosterism, I suggest that Minnesota offers an ideal venue for an economically informed study of federalism. Not only is Minnesota home to the Federal Reserve Bank that started this furor; it is home to the *Minnesota Journal of Global Trade, Constitutional Commentary*, and a storied tradition of analyzing constitutional law through practical reason rather than formal logic. Minnesota is home also to a burgeoning literature "on issues concerning economic regulation within federal systems."<sup>106</sup> Daniel Farber and Robert Hudec have compared the dormant Commerce Clause with the General Agreement on Tariffs and Trade.<sup>107</sup> Fred Morrison has offered an American perspective on

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101. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897), reprinted in 110 HARV. L. REV. 991, 1001 (1997).

102. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1606 (1997) (citing Enrich, *supra* note 71, at 442-43; Hellerstein & Coenen, *supra*, 73 at 846-48).

103. See, e.g., *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (stressing "not the formal language of the tax statute but rather its practical effect" in Commerce Clause challenges to state and local taxes); *accord* *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989); *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 295 (1987).

104. *Younger v. Harris*, 401 U.S. 37, 44 (1971); cf. *Printz v. United States*, 117 S. Ct. 2365, 2377 n.11 (1997) ("The fact is that our federalism is not Europe's.").

105. ROBERT GRAVES, GOOD-BYE TO ALL THAT (1929).

106. Jim Chen & Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1330 n.82 (1995).

107. See Farber & Hudec, *supra* note 24. Most recently Professor Hudec

federalism in settings international.<sup>108</sup> Daniel Gifford has synthesized American trade law, American and international antitrust law, and the dormant Commerce Clause.<sup>109</sup> Recognizing that American federalism is "triadic," comprising not only the states but also Indian tribes, Philip Frickey has singularly "domesticated" federal Indian law in the broader contexts of international law and American constitutional law.<sup>110</sup>

Such are the intellectual riches that feed this Symposium. The *Minnesota Law Review* stands ready to reap the Minneapolis Manifesto's newest academic harvest. Welcome to the Minnesota School of Federalism, where the economics is strong, the pragmatism is contagious, and all the ideas are above average.<sup>111</sup>

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has coedited (with economist Jagdish Bhagwati) a two-volume compilation called FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

108. See Fred L. Morrison & Rüdiger Wolfrum, *The Impact of Federalism on the Implementation of International Trade Obligations*, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 519 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993).

109. See Daniel J. Gifford, *Antitrust and Its Intellectual Milieu*, 37 ANTITRUST BULL. 333, 348-53, 359-65 (1997); Daniel J. Gifford, *Antitrust and Trade Issues: Similarities, Differences, and Relationships*, 44 DEPAUL L. REV. 1049 (1995); Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227 (1995); Daniel J. Gifford, *Rethinking the Relationship Between Antidumping and Antitrust Laws*, 6 AM. U.J. INT'L L. & POL'Y 277 (1991); Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, 6 MINN. J. GLOBAL TRADE 1 (1997).

110. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 31 (1996). For other examples of Professor Frickey's extensive work in federal Indian law, see Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Philip P. Frickey, *Content and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973 (1996) (book review); cf. Philip P. Frickey, *Lawnnet: The Case of the (Missing) Tenth Amendment*, 75 MINN. L. REV. 755 (1991) (spoofing the law of federalism in a context not involving Indian law). Professor Frickey also played a prominent role in organizing the two conferences inspired by the Minneapolis Manifesto. See Philip P. Frickey, *The Congressional Process and the Constitutionality of Federal Legislation to End the Economic War among the States*, THE REGION, June 1996, at 58.

111. Cf. GARRISON KEILLOR, *LEAVING HOME* xvii (1987) (describing the author's fictional hometown, Lake Wobegon, as a place "where all the women are strong, the men are good-looking, and all the children are above average").

## III. OUR FEDERALISM, OURSELVES

In an era when Darwinian ecology touches intellectual realms as seemingly remote as cosmology,<sup>112</sup> we might extract an organizing metaphor for this Symposium from the biological world. Federalism serves as an adaptive legal response to natural conditions. More precisely, governments adopt federalism or join federations in order to survive or thrive in a world shaped by unevenly distributed factor endowments.<sup>113</sup> Within every federation, each constituent state struggles to maximize its gains while contributing as little as possible to the central authority.<sup>114</sup> Conversely, the central authority has every incentive to aggrandize itself at the expense of the constituent states. From each actor's point of view, cooperation is a necessary evil, an expensive burden to be avoided.<sup>115</sup> Federalism, in short, is the legal analogue of symbiosis. As it was when beneficial parasites invaded ancient prokaryotes (simple single-celled organisms such as bacteria) and thus sparked the evolution of eukaryotes (complex multicelled organisms such as humans),<sup>116</sup> laws and legal institutions emerge from cooperation, defection, and other symbiotic processes.<sup>117</sup>

In law as in biology, "[t]he way a question is asked limits and disposes the ways in which any answer to it—right or wrong—may be given."<sup>118</sup> Although a molecular biologist, a geneticist,

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112. See LEE SMOLIN, *THE LIFE OF THE COSMOS* (1997); cf. John O. McGinnis, *The Original Constitution and Our Origins*, 19 HARV. J.L. & PUB. POL'Y 251 (1996) (comparing constitutional origins with humanity's biological origins). On a Darwinian approach to the social sciences, see generally *THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE* (Jerome H. Barkow et al. eds., 1992); CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1991).

113. Cf. Friedman, *supra* note 13, at 1448-53 (describing how economic and technological change motivates efforts to harmonize local laws on a national or international basis).

114. See Bednar & Eskridge, *supra* note 41, at 1449, 1470-76; Barry Weingast & Rui de Figueiredo, *Self-Enforcing Federalism: Solving the Two Fundamental Dilemmas* (1997) (unpublished manuscript, on file with author).

115. See Jenna Bednar, *Federalisms: Unstable by Design* (1997) (unpublished manuscript, on file with author).

116. See LYNN MARGULIS, *SYMBIOSIS IN CELL EVOLUTION: LIFE AND ITS ENVIRONMENT ON THE EARLY EARTH* 2-14 (1981).

117. See David Sloan Wilson & Elliot Sober, *Reintroducing Group Selection to the Human Behavior Sciences*, 17 BEHAV. & BRAIN SCI. 585 (1994).

118. SUZANNE K. LANGER, *PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE, AND ART* 3 (3d ed. 1957).

and an ecologist might ask different questions about a single biological phenomenon, all three might "be 'right' on different levels."<sup>119</sup> So might we approach the articles in this Symposium—as distinct yet interrelated queries into the pathology of the law.

In *Valuing Federalism*,<sup>120</sup> Barry Friedman argues that the Supreme Court systematically undervalues federalism.<sup>121</sup> Despite the revival of serious Commerce Clause scrutiny in *United States v. Lopez*,<sup>122</sup> Professor Friedman contends that the Court's chronic failure to develop a coherent theory of federalism has unduly expanded Congress's implied powers<sup>123</sup> and, in the context of conditional federal spending, betrayed the very notion of enumerated powers.<sup>124</sup> Preemption and the dormant Commerce Clause, Professor Friedman argues, have enabled Congress and the federal judiciary to displace large bodies of state law.<sup>125</sup> He attributes these "centripetal forces" to factors ranging from the states' sorry civil rights record to flourishing interstate trade and technological evolution.<sup>126</sup> Indeed, one of the New Deal's legal veterans marveled a generation ago at the "ease with which the public and the judiciary now swallow the federal regulation of what were once deemed exclusively local matters."<sup>127</sup>

In response to the devaluing of federalism, Professor Friedman defends state authority as the best guarantor of public participation, accountable government, political experimentation, and cultural diversity.<sup>128</sup> He nevertheless acknowledges the value of national government in providing public goods, combatting interstate externalities and the "race to the bottom," and establishing uniform standards for interstate and international

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119. MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 42 (1993).

120. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).

121. *See id.* at 317, 335-37.

122. 514 U.S. 549 (1995).

123. Friedman, *supra* note 120, at 338-40 (discussing, *inter alia*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

124. *See id.* at 340-42 (discussing, *inter alia*, *South Dakota v. Dole*, 483 U.S. 203 (1987)).

125. *See id.* at 342-60.

126. *See id.* at 365-78.

127. Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 284 (1973).

128. *See* Friedman, *supra* note 120, at 386-405.

trade.<sup>129</sup> These are the ground rules by which the United States will establish a third century of federalism.<sup>130</sup> Professor Friedman's analysis thus provides the normative framework by which to assess the four other articles in this Symposium.

Those articles transform the Minneapolis Manifesto's focused critique of local public finance into a more extensive inquiry into public choice and multijurisdictional cooperation. Whereas Walter Hellerstein and Clayton Gillette revisit the positive legality and normative desirability of local development subsidies,<sup>131</sup> Richard Briffault studies the "subatomic" units of American government—the municipal and submunicipal entities that transform local government law into a distinctive branch of federalism.<sup>132</sup> Richard Revesz explores the idea of a race to the bottom among competing states in the realm of environmental enforcement.<sup>133</sup>

This is not to suggest that the central questions of public finance have been settled. Quite the contrary. The constitutionality of local development incentives remains hotly contested. In a 1996 article written with Dan Coenen, Professor Hellerstein "offered an overarching theory of how the Commerce Clause interacts with both state-tax and state-subsidy incentives."<sup>134</sup> Peter Enrich's contemporaneous study<sup>135</sup> agreed "that there is a substantial class of tax incentives . . . which cannot withstand Commerce Clause scrutiny."<sup>136</sup> In this Symposium,

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129. See *id.* at 405-409.

130. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988) (compiling the conventional arguments in favor of state independence within a federal system).

131. Compare Walter Hellerstein, *Commerce Clause Restraints on State Tax Incentives*, 82 MINN. L. REV. 413 (1997) with Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447 (1997).

132. See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503 (1997).

133. See Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).

134. See Hellerstein & Coenen, *supra* note 73, at 870.

135. See Enrich, *supra* note 71. Compare *id.* at 408 n.159 (acknowledging the simultaneous drafting and completion of Hellerstein and Coenen's article) with Hellerstein & Coenen, *supra* note 73, at 871 n.444 (acknowledging the simultaneous drafting and completion of Enrich's article).

136. Hellerstein & Coenen, *supra* note 73, at 871 n.444; cf. Enrich, *supra* note 71, at 440 n.344 (noting that the two "class[es] of incentives" condemned by Enrich are "more or less coterminous with the class[es] that Hellerstein and Coenen [identify as] unconstitutional in their . . . article").

Professor Gillette argues to the contrary "that the feared scope and consequences" of a putative war between the states "may be overblown," "the benefits of such competition may be understated," and "the proposed remedy—federal intervention—imposes additional costs."<sup>137</sup>

But Professors Hellerstein, Coenen, Enrich, and Gillette have reached a consensus on other matters. All four agree that a flat rule against state-law subsidies would sweep too broadly.<sup>138</sup> Everyone agrees that "[t]o say that subsidies are ordinarily constitutional is not to say that they are always so,"<sup>139</sup> much less to say when subsidies *should* be distributed. The real difference lies in dividing the constitutional from the condemned. At the risk of oversimplifying nuanced arguments, one can describe each competing viewpoint according to its controlling principle. Whereas Professor Enrich would strike down measures that cause excessive "economic distortion,"<sup>140</sup> Professors Hellerstein and Coenen stress the "coercive" nature of unconstitutional schemes.<sup>141</sup> Echoing Richard Collins's reminder that economic union is worth protecting by constitutional means,<sup>142</sup> Professor Gillette asks whether a challenged tax or subsidy would reduce the social welfare of the United States.<sup>143</sup> All four combatants rightfully recognize that the market-participant exception sheds singularly important light on the question of business incen-

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137. Gillette, *supra* note 131, at 447-48.

138. See Enrich, *supra* note 71, at 446-47, 458-63 (noting that only "explicitly discriminatory" state incentives will trigger Commerce Clause scrutiny); Gillette, *supra* note 131, at 450 ("[I]t cannot be that the Commerce Clause seeks to prohibit *all* forms of interstate competition."); Hellerstein, *supra* note 131, at 424 ("[A]ll state tax incentives cannot *really* be unconstitutional."); Hellerstein & Coenen, *supra* note 73, at 870 ("State business incentives will neither stand nor fall *en masse* under our analysis.").

139. Hellerstein & Coenen, *supra* note 73, at 848; cf. Chris Farrell, *The Economic War Among the States: An Overview*, THE REGION, June 1996, at 4, 7 ("[T]here is an enormous range for action between an outright federal ban and checkbook competition.").

140. See Enrich, *supra* note 71, at 453-58.

141. See Hellerstein, *supra* note 131, at 424-31; Hellerstein & Coenen, *supra* note 73, at 806-13.

142. See Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988).

143. See Gillette, *supra* note 131, at 492.

tives.<sup>144</sup> Finally, all four share a commitment to existing case law, to upholding precedent rather than plotting revolution.<sup>145</sup>

These articles merit comparison with another recent piece by Professor Gillette. State-law business incentives are actually the mirror image of another phenomenon involving the interaction of government and the private economy. When citizens "opt out" of public schooling, police protection, or mail delivery, private entities enter markets previously controlled by public authorities.<sup>146</sup> Conversely, a state-law business incentive supplements the private stream of revenue that ordinarily determines expansion or relocation decisions. Each instance of opting out demonstrates that even putatively public goods can be produced without governmental involvement,<sup>147</sup> and every developmental subsidy rests on the promise of positive externalities. What Professor Gillette has said of "opting out" therefore applies with equal force here: We should eschew "a single-minded embrace" of any solution to federalism's myriad problems, for a simple matrix comparing economic effects with political costs will not "weigh properly all the [relevant] variables."<sup>148</sup>

Professor Briffault's introspective look at sublocal governments stands in stark contrast with Professor Friedman's lament over "centripetal tendencies" in American public law.<sup>149</sup> In Professor Briffault's survey, American cities are leading a countervailing, centrifugal trend.<sup>150</sup> Because city borders determine the constituency and tax base for any locally financed project,<sup>151</sup> the demarcation of municipal governments within any state represents another form of "Our Federalism."<sup>152</sup> In-

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144. See Enrich, *supra* note 71, at 441-43; Gillette, *supra* note 131, at 492-93; Hellerstein & Coenen, *supra* note 73, at 845-46 (describing the Court's attitude towards the market-participant exception).

145. See Enrich, *supra* note 71, at 424; Gillette, *supra* note 131, at 495; Hellerstein & Coenen, *supra* note 73, at 870.

146. See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1187 (1996); cf. Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 456-62 (1988) (exploring instances in which the private sector displaces publicly supplied goods or services altogether).

147. See, e.g., R.H. Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

148. Gillette, *supra* note 146, at 1219.

149. See Friedman, *supra* note 120, at 365-78.

150. See Briffault, *supra* note 132, at 508.

151. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1128-32 (1996).

152. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism:*



deed, local government law is an arguably more significant manifestation of federalism, even if American constitutional law insists on treating subdivisions as legally insignificant "convenient agencies" of state government.<sup>153</sup> To the extent that "decentralization in a single city" offers citizens more "realistic choices among government service packages" than does decentralization at the state level,<sup>154</sup> sublocal devolution of power matters more than traditional federalism. Enterprise zones often promise extensive regulatory relief but usually rely on modest subsidies, tax breaks, and other standard forms of target public assistance.<sup>155</sup> Tax increment financing—the practice of freezing property valuations in a putatively depressed neighborhood—has become a leading method of preferential taxation.<sup>156</sup> By contrast, special zoning districts seek to steer or limit development according to the "singular characteristics" of a favored group such as artists or clothing designers.<sup>157</sup> Finally, by combining elements of enterprise zones and special zoning districts, business improvement districts facilitate the finance and delivery of public services such as sanitation or security within a neighborhood.<sup>158</sup>

The proliferation of sublocal structures warrants substantial modifications in Charles Tiebout's "pure theory of local expenditures,"<sup>159</sup> for four decades the dominant economic model of local government law.<sup>160</sup> According to Tiebout, cities compete for residents and revenues by offering different packages of taxes and services, and rational "consumer-voters" respond by moving.<sup>161</sup> Tiebout's model assumes a large number of small localities and

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*Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

153. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907); *accord Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *see also United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 215 (1984); *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

154. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 919 (1994) (citing ERIC A. NORDLINGER, *DECENTRALIZING THE CITY: A STUDY OF BOSTON'S LITTLE CITY HALLS* (1972)).

155. *See Briffault, supra* note 132, at 509-12.

156. *See id.* at 512-14.

157. *See id.* at 514-17.

158. *See id.* at 517-21.

159. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

160. For merely one example reflecting Tiebout's influence on legal scholarship concerning federalism, *see Michael W. McConnell, Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (book review).

161. *See Tiebout, supra* note 159, at 419.

a completely informed, mobile population<sup>162</sup>—in other words, the characteristics of perfectly competitive markets. In practice, perfectly competitive markets, whether for goods or for residents, do not exist.<sup>163</sup> Unlike the economies of scale that make large firms more formidable contenders in contestable markets,<sup>164</sup> however, heterogeneity and the elevated costs of taxpayer exit cripple large cities in their competition for residents.<sup>165</sup> Intracity federalism overcomes these diseconomies of urban scale. According to Professor Briffault, sublocal divisions help big cities compete with their smaller counterparts and may even lead to intracity competition among sublocal divisions.<sup>166</sup>

Professor Revesz's survey of regulatory rationales in environmental law transports this Symposium in the opposite direction. When seen as the link between the primary rationales for multijurisdictional environmental cooperation, federalism loses its character as a uniquely American institution. A dump is a dump is a dump. As Professor Revesz has recognized elsewhere,<sup>167</sup> the behavior of the states under the domestic Clean Air Act<sup>168</sup> can be compared with the behavior of member-states of the European Union or that of signatory states under the Montreal Protocol.<sup>169</sup> In this Symposium, Professor Revesz

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162. See *id.* (assuming that "[c]onsumer-voters are fully mobile" and "have full knowledge of differences among [cities'] revenues and expenditure patterns" and that "[t]here are a large number of communities in which the consumer-voters may choose to live").

163. See DENNIS MUELLER, PUBLIC CHOICE II, at 149-76 (1979); Robert P. Inman & Daniel L. Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States*, in *FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY* 79, 79 (Harry N. Scheiber ed., 1988).

164. See Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 121 (1984).

165. Briffault, *supra* note 132, at 506-07.

166. See *id.* at 526-28.

167. See Richard L. Revesz, *Federalism and Environmental Regulation: A Normative Critique*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 97 (John Ferejohn & Barry R. Weingast eds., 1997).

168. 42 U.S.C. §§ 7401-7671q (1994). See generally John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183 (1995).

169. See United Nations: Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides or Their Transboundary Fluxes, Oct. 31, 1988, 28 I.L.M. 212 (1989). See generally Cliona J.M. Kimber, *A Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658 (1995); Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587 (1994); Richard B. Stewart, *Environmental Law in the United States and the European Community: Spillovers, Cooperation, Rivalry, Institutions*, 1992 U. CHI. LEGAL F. 41.

focuses on two of the principal rationales for centralizing environmental law:<sup>170</sup> the "race to the bottom" that occurs as smaller jurisdictions relax environmental standards in an effort to attract businesses<sup>171</sup> and the problem of interstate externalities.<sup>172</sup> Professor Revesz argues that the radically underinclusive "race to the bottom" rationale cannot justify a centralized approach to environmental protection. Consistent with the prevailing criticism of this argument in the international trade literature,<sup>173</sup> he shows that any advantage conferred by lowered environmental standards is likely to be offset by numerous other factors and that the states would compete by other means under a system of centralized environmental enforcement.<sup>174</sup> He also shows how the Clean Air Act, though plausibly defended as a shield against each state's tendency to export environmental damage, has actually given the states perverse incentives to externalize ecological harm.<sup>175</sup>

Professor Revesz's criticism of the race to the bottom and interstate externality rationales reverberates far beyond the environmental area. As Daniel Farber has shown, the conditions thought to support centralized environmental protection are structurally similar to the rationales underlying free trade law.<sup>176</sup> Armed with this insight, we can easily reinterpret Pro-

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170. See Revesz, *supra* note 133.

171. See also Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that interstate competition produces more favorable results than federal environmental standards); cf. Peter B. Pashigan, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 23 ECON. INQUIRY 551 (1985) (describing how different regions within the United States compete on an environmental basis in order to achieve a comparative economic advantage).

172. See also Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341 (1996).

173. See, e.g., Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 28 (1996) (concluding that "[t]he size of the commercial advantage" attained by "countries with weak environmental standards" "is usually too small to generate serious business concerns"); cf. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992) (attributing much of the fear of environmental degradation in a free trade regime to cultural differences between advocates of environmental protection and advocates of free trade).

174. See Revesz, *supra* note 133, *passim*.

175. See *id.* at 541.

176. See Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. (forthcoming 1997); cf. Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV.

fessor Revesz's criticism of federal environmental law as an implicit rejection of the Minneapolis Manifesto. Indeed, Professor Revesz questions outright "why one ought to reject across-the-board a model of a competitive market in location rights."<sup>177</sup> If there is no polluter's race to the bottom, there is likewise no basis for demanding a federal resolution, judicial or legislative, of the arms race in local business incentives.

Yet the Minneapolis Manifesto is far from lost. Its most practical question remains unanswered: Why do the proponents of sports subsidies so consistently win (as do the supporters of most other local business incentives)? "If you build it," say the boosters, "they will come."<sup>178</sup> But many a city will strike out in the sports subsidy derby. There will be no joy in Mudville. More than baseball itself in the jaded eyes of its bored detractors, the quest for business development subsidies "is a game with increasingly heightened anticipation of increasingly limited action."<sup>179</sup> When the number of medium-sized to large Amercian cities exceeds the number of major league sports franchises, why do so many cities, in the fashion of a profligate Kubla Khan, "a splendid pleasure-dome decree"?<sup>180</sup> What sort of farm team federalism have we achieved, in which every city scrambles desperately to avoid minor-league status?

A complete response requires attention to special-interest politics within federal systems. Professor Revesz notes that public choice concerns might justify federal environmental law, but he does not comprehensively assess this regulatory rationale.<sup>181</sup> The key therefore lies in what this Symposium does *not* say. "Thirty spokes join at the hub: their use for the cart is where they are not."<sup>182</sup> The real answer to the Manifesto's unanswered question "lies in the politics, not the economics, of location incentives."<sup>183</sup> To explain how the political economy of the special-interest state af-

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1247, 1273 (1996) (seeking an approach to international environmental and economic law that "somehow give[s] credence to [the] sets of values" represented by the competing, "fundamentally incomplete" visions of "[g]lobalism and localism").

177. Revesz, *supra* note 133, at 563.

178. *Watch FIELD OF DREAMS* (Universal 1989).

179. JOHN IRVING, *A PRAYER FOR OWEN MEANY* 31 (1989).

180. SAMUEL T. COLERIDGE, *KUBLA KHAN*, line 2 (1816).

181. See Revesz, *supra* note 133, at [ms 104, 108].

182. Lao-tzu, *Tao Te Ching*, in *THE ESSENTIAL TAO* 14 (Thomas Cleary trans., Harper Collins 1991).

183. Enrich, *supra* note 71, at 393.

fects the law of interjurisdictional cooperation, I will revisit a crucial but forgotten footnote in the annals of American federalism.

#### IV. *FILBURN'S* FORGOTTEN FOOTNOTE

##### A. THE POWER OF MYTH

*His name was farmer Filburn, we looked in on his wheat sales.  
We caught him exceeding his quota. A criminal hard as nails.  
He said, "I don't sell none interstate."  
I said, "That don't mean cow flop.  
We think you're affecting commerce."  
And I set fire to his crop, HOT DAMN!  
Cause we got interstate commerce  
Ain't no where to run!  
We gone regulate you  
That's how we have fun.*<sup>184</sup>

If indeed the framers of the American Constitution "split the atom of sovereignty,"<sup>185</sup> then the Justices of the New Deal era sustained federalism's first chain reaction.<sup>186</sup> In 1942, the year in which Enrico Fermi harnessed atomic fission, the Supreme Court decided *Wickard v. Filburn*.<sup>187</sup> This decision has since become deeply embedded in America's constitutional canon.<sup>188</sup> Like most other canonical works, *Filburn* has assumed both historical and mythical dimensions, and it behooves us to distinguish the two.<sup>189</sup> Only after isolating *Fil-*

184. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 674 (1995) (setting these lyrics to the tune of "Convoy").

185. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); see also United States v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) ("[F]ederalism was the unique contribution of the Framers to political science and political theory.").

186. Cf. Missouri v. Holland, 252 U.S. 416, 434 (1918) (upholding an expansive view of the federal treaty power in spite of "invisible radiation" emanating from the tenth amendment).

187. 317 U.S. 111 (1942).

188. See generally IS THERE A CONSTITUTIONAL CANON? (Sanford Levinson & J.M. Balkin eds., forthcoming 1997).

189. Cf. JAMES BARR, THE SCOPE AND AUTHORITY OF THE BIBLE 1-17 (1980) (distinguishing the historical portions of the Bible from passages that more properly belong to the realm of "myth and legend"); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1092-93 (1995) (identifying similarities and differences among religious, literary, and legal interpretation).

burn's mythical elements can we properly appreciate its historical significance.<sup>190</sup>

*Filburn*, so its myth goes, represented the high-water mark of the New Deal's constitutional revolution. From the very beginning, *Filburn* has awed defenders of state sovereignty. The meekest commentators demurred that the decision rested "primarily upon a rather extended concept of competition."<sup>191</sup> More audacious critics expressed "wonder as to the limits of [Congress's] tremendous and constantly growing power" to regulate interstate commerce.<sup>192</sup> A half-century later, the myth of *Filburn* reached full flower. *United States v. Lopez*<sup>193</sup> described *Filburn* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."<sup>194</sup> So much for *Filburn*'s own observation that "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."<sup>195</sup> In our day, *Garcia*<sup>196</sup> may represent the jurisprudential nadir for the states,<sup>197</sup> but *Filburn* still rates as one of the most significant points on the downward arc that began with *NLRB v. Jones & Laughlin Steel Corp.*<sup>198</sup>

Law can turn even outrageous myth into history through a sufficiently persistent pattern of citations. This path from

190. Cf. KAREN ARMSTRONG, A HISTORY OF GOD: THE 4,000-YEAR QUEST OF JUDAISM, CHRISTIANITY AND ISLAM 211 (1993) (tracing the English words *myth*, *mysticism*, and *mystery* to the same Greek root and describing all three words as "rooted in an experience of darkness and silence").

191. Note, *The Supreme Court of the United States During the October Term, 1942* (pt. 1), 43 COLUM. L. REV. 837, 845 (1943).

192. John J. Trenam, Note, *Commerce Power Since the Schechter Case*, 31 GEO. L.J. 201, 202 (1946).

193. 514 U.S. 549 (1995).

194. *Id.* at 560.

195. *Filburn*, 317 U.S. at 120 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).

196. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

197. See Kramer, *supra* note 93, at 1486 (observing that *Garcia* advises judges to do very little to allocate power between states and federal government); William Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1721 (1985).

198. 301 U.S. 1 (1937); see *Lopez*, 514 U.S. at 556 ("Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause."); Earl M. Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause—A Case Study in the Decline of State Autonomy*, 19 HARV. J.L. & PUB. POL'Y 121, 129 (1995) ("In the wake of Jones & Laughlin and Wickard, it has become clear that . . . Congress has authority to regulate virtually all private economic activity.").

dogma to doctrine has transfigured *Filburn* into a major constitutional decision. *Filburn* stands for the proposition that "substantial economic effect[s]"<sup>199</sup> outweigh facile judicial distinctions between the "direct" and the "indirect" in Commerce Clause cases.<sup>200</sup> Critically, the case has added the "aggregation" maneuver to constitutional law's argumentative arsenal. *Filburn* lets Congress reach any economic actor "trivial by itself" as long as his or her "contribution" to the national economy, "taken together with that of many other[]" actors "similarly situated, is far from trivial."<sup>201</sup> *Filburn's* aggressive stand against willful judicial ignorance of actions trivial in themselves influences even dormant Commerce Clause doctrine: the "practical effect" of a state law "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation."<sup>202</sup>

In an age when the Tenth Amendment has been promoted from a "truism"<sup>203</sup> to a serious statutory and constitutional

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199. *Filburn*, 317 U.S. at 125.

200. *Id.* at 120 ("[Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."); *id.* at 125 (noting that even local, noncommercial activity "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'"); *accord Lopez*, 514 U.S. at 556; *New York v. United States*, 505 U.S. 144, 158 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 536 (1985); *Hodel v. Virginia Surface Mining Ass'n*, 452 U.S. 264, 308 (1981); *Maryland v. Wirtz*, 392 U.S. 183, 196 n.27 (1968).

201. 317 U.S. at 127-28; *accord Lopez*, 514 U.S. at 556; *Perez v. United States*, 402 U.S. 146, 151 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 275 (1964).

202. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *accord Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 406 (1994) (O'Connor, J., concurring in the judgment); cf. Maltz, *supra* note 198, at 129-30 (bemoaning *Filburn's* contribution to the erosion of the Supreme Court's respect for state autonomy and deference to state legislative judgments in its dormant Commerce Clause cases).

203. *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered."); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (Marshall, C.J.) (describing the language of the Tenth Amendment as "leaving the question, whether [a] particular power . . . has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the [Constitution as a] whole instrument").

player,<sup>204</sup> these legal truths are no longer held to be self-evident. Among *Filburn*'s detractors, Richard Epstein minces no words; in his mind, "[t]he decision cannot pass the 'giggle test.'"<sup>205</sup> For advocates of decentralized government, *Wickard v. Filburn* is at best an immolation of the framers' federalism, at worst the paradigmatic instance of the toothless Commerce Clause jurisprudence that prevailed between *Jones & Laughlin* and *Lopez*. In radical federalism's jihad, *Filburn* is the great Satan.

"Every holy war needs a few heretics, and this one is no exception."<sup>206</sup> Only an agriculturally illiterate society could be bedazzled into believing the myth of *Wickard v. Filburn*.<sup>207</sup> By its own terms, *Filburn* was not a landmark case. The three-judge district court that heard the case failed even to mention the Commerce Clause.<sup>208</sup> The Supreme Court intimated that *Filburn*'s Commerce Clause question "would merit little consideration in light of *United States v. Darby*."<sup>209</sup> One of the New Deal's front-line legal warriors agreed: "*Wickard v. Filburn* adds little to the *Darby* case insofar as the pronouncement of affirmative guiding principles is concerned."<sup>210</sup> *Darby* and the cases it spawned<sup>211</sup> had all but gutted *Schechter Poultry* and *Carter Coal*'s shaky distinction between commerce and manu-

204. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

205. Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 173 (1996).

206. Jim Chen, *Titanic Telecommunications*, 25 SW. U. L. REV. 535, 542 (1996).

207. On agricultural illiteracy, see generally Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 619 (1994), which documents the "gulf between our apparent concerns for health and our understanding of the scientific and economic processes of agriculture."

208. See *Filburn v. Helke*, 43 F. Supp. 1017 (S.D. Ohio), *rev'd sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942).

209. *Filburn*, 317 U.S. at 118 (citing *United States v. Darby*, 312 U.S. 100 (1941)).

210. Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 HARV. L. REV. 883, 908 (1946).

211. See *Overnight Transp. Co. v. Missel*, 316 U.S. 572 (1942); *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Cloverleaf Co. v. Patterson*, 315 U.S. 148 (1942); *Gray v. Powell*, 314 U.S. 402 (1942); *United States v. Darby*, 312 U.S. 100 (1941). All of these cases were cited in *Filburn*, 317 U.S. at 118 & n.12.



facturing, production, agriculture.<sup>212</sup> Not even the "aggregation" argument originated in *Filburn*; a Term earlier, *Darby* had already deployed similar reasoning.<sup>213</sup> *Filburn* followed as a matter of course.<sup>214</sup>

In order to understand *Filburn*'s true significance, we must do the unexpected. Instead of revisiting *Filburn*'s familiar formulations of the commerce power, we must excavate one of Justice Jackson's more obscure footnotes. Instead of examining the decision as a constitutional landmark, we must examine *Filburn* as a relatively perfunctory case in a series of agricultural controversies. To that task I now turn.

## B. AMBER WAVES OF GRAIN

As every law student learns,<sup>215</sup> "Old Man Filburn had a farm, / and losing was his fate."<sup>216</sup> By contrast, thanks "to what can charitably be described as intellectual hostility" in most law schools "to the study of 'farm' law,"<sup>217</sup> virtually no American lawyer understands *Filburn* as an agricultural dispute. Whatever its proper place in the constitutional canon, *Wickard v. Filburn* is probably the Supreme Court's second most famous agricultural law case, ranking close behind *United States v.*

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212. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935); see also *United States v. E.C. Knight Co.*, 156 U.S. 1, 14, 16 (1895).

213. See *Darby*, 312 U.S. at 121 ("A familiar . . . exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."); *id.* at 123 ("[I]n present day industry, competition by a small part may affect the whole and . . . the total effect of the competition of many small producers may be great."); accord *Filburn v. Helke*, 43 F. Supp. 1017, 1022 (S.D. Ohio) (Allen, J., dissenting), *rev'd sub nom. Wickard v. Filburn*, 317 U.S. 111 (1942).

214. Cf. *Mandeville Island Farms v. American Crystal Sugar Co.*, 344 U.S. 219, 228 (1948) (arguing that distinctions between "production" and "manufacturing" on one hand and "commerce" on the other could no longer be sustained after *Filburn*).

215. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every school-child learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."); Frickey, *Domesticating Federal Indian Law*, *supra* 110, at 31-33 (criticizing this view of federalism—and the Court's abuse of Lord Macaulay's metaphor).

216. Jim Chen, *The Constitutional Law Songbook*, 11 CONST. COMMENTARY 263, 265 (1994).

217. Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 ARK. L. REV. 503, 511 (1990).

*Carolene Products Co.*,<sup>218</sup> a few notches ahead of *The Slaughter-House Cases*,<sup>219</sup> *Nebbia v. New York*,<sup>220</sup> and *United States v. Butler*,<sup>221</sup> and far, far ahead of *Sakraida v. Ag Pro, Inc.*,<sup>222</sup> the Burger Court's infamous "cow shit case."<sup>223</sup> By contrast, no footnote among the thirty-eight in *Filburn* rivals the notoriety of footnote four<sup>224</sup> or even footnote three<sup>225</sup> in *Carolene Products*. This is a shame, for footnote twenty-seven of *Wickard v. Filburn* is one spectacular specimen of Supreme Court marginalia. A proper understanding of that footnote, however, requires a brief survey of American agriculture and its regulation between the World Wars.

Roscoe Filburn incurred a penalty for overplanting the wheat allotment on his Ohio farm by a two-to-one margin.<sup>226</sup> He unsuccessfully complained, *inter alia*, that Claude Wickard's Department of Agriculture could not constitutionally regulate insofar as the wheat was consumed on the farm and not thrust into interstate commerce.<sup>227</sup> The fuller economic and legal background is less well known, even though the plight of American farmers during the Great Depression is the stuff of legend.<sup>228</sup> Agricultural crisis presaged the 1932 election. Already laid prostrate by the boll weevil,<sup>229</sup> the South ab-

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218. 304 U.S. 144 (1938).

219. 83 U.S. (16 Wall.) 36 (1873).

220. 291 U.S. 502 (1934).

221. 297 U.S. 1 (1934).

222. 425 U.S. 273 (1976).

223. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 419 (1979) (describing how Chief Justice Burger insulted Justice Brennan by assigning him *Sakraida*, a dreary "patent dispute over a water flush system designed to remove cow manure from the floor of dairy barns").

224. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (reserving a "more searching judicial inquiry" for cases involving "prejudice against discrete and insular minorities").

225. *Id.* at 150 n.3 (stressing "the great importance to the public health of butter fat and whole milk"). See generally *Aside, Don't Cry over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553 (1988).

226. See *Wickard v. Filburn*, 317 U.S. 111, 114-15 (1942).

227. See *id.* at 118-29.

228. Compare, e.g., JOHN STEINBECK, *THE GRAPES OF WRATH* (1939) (describing the westward migration of white Okies during the Dust Bowl) with, e.g., TONI MORRISON, *JAZZ* (1992) (describing the northerly migration of southern sharecroppers before the Dust Bowl).

229. See 4 U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, at 12 (1932) ("The boll weevil was

sorbed several more devastating blows. Foreclosure auctions on a single day in April 1932 moved one-quarter of Mississippi's land.<sup>230</sup> The Farmers' Holiday Association organized and carried out violent demonstrations throughout the Midwest.<sup>231</sup> For once in American agricultural history, North and South were united in mutual misery.<sup>232</sup> Into the agrarian chaos strode Franklin D. Roosevelt, the patrician Squire of Hyde Park.<sup>233</sup> But Roosevelt's earliest efforts to deliver price and income support<sup>234</sup> and debt relief<sup>235</sup> to the farm met constitutional defeat in the Supreme Court.<sup>236</sup> The Agricultural Adjustment Act of 1933, touted by the President as "the most drastic and far-reaching piece of farm legislation proposed in time of peace"<sup>237</sup> and decried by opponents as "the worst farm bill ever written,"<sup>238</sup> lay in ruins.

By the end of Roosevelt's second term, however, Congress and a more compliant Court had restored the basic architecture of the New Deal's agricultural policy. From 1935 to 1938, Con-

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probably responsible for more changes in the number of farms, farm acreage, and farm population [during the 1920s] than all other causes put together."); Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1303 (1995); Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 397-98 (1997).

230. See WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 23 (1963).

231. See GILBERT C. FITE, AMERICAN FARMERS: THE NEW MINORITY 53-54 (1981).

232. Cf. Chen, *supra* note 229, at 1316-19 (contrasting the northern and southern traditions in American agriculture); Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 476-80 (1975) (same).

233. See FRANK FREIDEL, FRANKLIN D. ROOSEVELT: THE TRIUMPH 342-50 (1956) (describing the formation of Roosevelt's agricultural policy during the 1932 campaign over a series of meetings with farm leaders at Hyde Park).

234. See Agricultural Adjustment Act of 1933, Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-626 (1994)).

235. See Frazier-Lemke Farm Bankruptcy Act, Act of June 28, 1934, ch. 869, 48 Stat. 1289.

236. See *United States v. Butler*, 297 U.S. 1, 74-75 (1936) (invalidating the Agricultural Adjustment Act); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-98 (1935) (invalidating the Farm Bankruptcy Act).

237. FRANKLIN D. ROOSEVELT, *New Means to Rescue Agriculture—The Agricultural Adjustment Act*, in 2 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 74, 79 (1938); cf. Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 342-43 (1983) (describing the "instrumental" role played by "the personality of Franklin D. Roosevelt" in the development of New Deal agricultural policy).

238. Gilbert C. Fite, *Farmer Opinion and the Agricultural Adjustment Act, 1933*, 48 MISS. VALLEY HIST. REV. 656, 669 (1962) (quoting an editorial published in the *Philadelphia Public Ledger*).

gress passed four major statutes that reinstated the invalidated laws in all but name: a new Frazier-Lemke Farm Bankruptcy Act of 1935,<sup>239</sup> the Soil Conservation and Domestic Allotment Act of 1936,<sup>240</sup> the Agricultural Marketing Agreement Act of 1937,<sup>241</sup> and the monumental Agricultural Adjustment Act of 1938.<sup>242</sup> The soil conservation law evaded judicial review because "[n]o one could challenge the value" or the constitutionality "of conservation."<sup>243</sup> By 1939, the three other statutes had withstood constitutional challenges.<sup>244</sup> A decision upholding a tobacco inspection statute undoubtedly reinforced the Roosevelt administration's growing sense of invulnerability in agricultural regulation.<sup>245</sup>

Seen against this backdrop, *Filburn* hardly appears an agricultural milestone, much less a constitutional one. Payments for planting "soil-conserving" crops restored most of the acreage reduction and income support agenda of the invalidated Agricultural Adjustment Act of 1933.<sup>246</sup> *Mulford v. Smith*<sup>247</sup> then upheld the Agricultural Adjustment Act of 1938,<sup>248</sup> and other cases established Congress's power to fix commodity prices directly.<sup>249</sup> *United States v. Darby*<sup>250</sup> resolved

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239. Act of Aug. 28, 1935, ch. 792, 49 Stat. 942.

240. Act of Feb. 29, 1936, ch. 104, 49 Stat. 1148.

241. Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended at 7 U.S.C. §§ 601-624, 671-674 (1994)).

242. Act of Feb. 16, 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281-1393 (1994)).

243. Breimyer, *supra* note 237, at 348; cf. *Mayo v. United States*, 319 U.S. 441, 446-48 (1943) (exempting fertilizer distributed by federal agriculture officials from a Florida inspection law under the theory of intergovernmental immunity).

244. See *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 562-81 (1939) (upholding the Agricultural Marketing Agreement Act); *Mulford v. Smith*, 307 U.S. 38, 47-51 (1939) (upholding the Agricultural Adjustment Act of 1938); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440, 470 (1937) (upholding the Farm Bankruptcy Act of 1935).

245. See *Currin v. Wallace*, 306 U.S. 1, 5-19 (1939) (upholding the Tobacco Inspection Act, Act of Aug. 23, 1935, ch. 623, 49 Stat. 731).

246. See Fite, *supra* note 238, at 60; Breimyer, *supra* note 237, at 348-49 & n.65; Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333, 343 (1995).

247. 307 U.S. 38 (1939).

248. See also *Troppey v. LaSara Farmers Gin Co., Inc.*, 113 F.2d 350, 352 (5th Cir. 1940) (upholding the Act's marketing quotas for cotton).

249. See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393-94 (1940); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 571 (1939); cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-16 (1936) (declining to rule on Congress's power to fix coal prices).

most of the important remaining Commerce Clause issues. To the extent it relitigated these cases, *Filburn* seems more analogous to the contemporaneous and deservedly obscure *Wrightwood Dairy* case,<sup>251</sup> which forced the Court to revisit the Agricultural Marketing Agreement Act when a federal appeals court "inexplicabl[y]" held "that intrastate milk competing in the same market with interstate was not subject to the commerce power."<sup>252</sup>

What distinguished *Wickard v. Filburn* was wheat.<sup>253</sup> Ah, "wheat, the king of all grains!"<sup>254</sup> Earlier decisions on Congress's power to regulate agriculture had involved tobacco<sup>255</sup> or milk.<sup>256</sup> Wheat differed in two key respects. First, wheat has a global reach that neither tobacco nor milk can match.<sup>257</sup> One of merely a dozen or so plant species that dominate the human diet, wheat is grown widely and shipped even further.<sup>258</sup> The outbreak of world war magnified the importance of the wheat market. (As we shall see, though, the real problem in the years preceding *Filburn* was a wheat surplus, not a shortage.) Second, unlike tobacco, milk, or cotton, wheat is as readily used by its producer as it is sold to a processor. Because "[f]armers did not use raw cotton or tobacco themselves," they "brought nearly all to the tobacco warehouse or the cotton gin for marketing."<sup>259</sup> As for milk, the dependency of dairy producers on economically independent "handlers" has driven legal disputes as old as co-operative marketing and as new as *West Lynn*.<sup>260</sup> A clever

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250. 312 U.S. 100 (1941).

251. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942).

252. Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946* (pt. 2), 59 HARV. L. REV. 645, 689 (1946).

253. See Stern, *supra* note 210, at 901.

254. O.E. RÖLVAAG, *GIANTS IN THE EARTH* 110 (Lincoln Colcord & O.E. Rölvaag trans., 1927).

255. See *Mulford v. Smith*, 307 U.S. 38 (1939); *Curran v. Wallace*, 306 U.S. 1 (1939).

256. See *Wrightwood Dairy Co.*, 315 U.S. 110; *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939).

257. Cf. JIM LONGMIRE & WALTER H. GARDINER, *ECON. RESEARCH SERV., U.S. DEPT OF AGRIC., LONG TERM DEVELOPMENTS IN TRADE IN FEED AND LIVESTOCK PRODUCTS* 2 (1984) (reporting that 90% of wheat traded internationally is used as food).

258. See generally Moshe Feldman et al., *Wheats*, in *EVOLUTION OF CROP PLANTS* 184, 184-92 (J. Smartt & N.W. Simmonds eds., 2d ed. 1995).

259. Stern, *supra* note 210, at 902.

260. Compare, e.g., *United States v. Borden Co.*, 308 U.S. 188 (1939) (interpreting the Capper-Volstead Act's exemption from the federal antitrust laws) with, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (holding

regulator (or monopolist) can target a single bottleneck by which to command these markets. Wheat's exceptional mobility and its versatility as a food crop and a feed grain led to a singularly instructive regulatory conflict.

Proceeding from the grand to the particular, let us look first at the global market for wheat between the World Wars. The immediate impetus for *Filburn* came from the Department of Agriculture's decision to impose wheat quotas for crop year 1941.<sup>261</sup> As the Supreme Court recognized, however, "[t]he wheat industry ha[d] been a problem industry for some years."<sup>262</sup> The period immediately before World War I, memorialized as the "parity" period in federal agricultural statutes,<sup>263</sup> were American farmers' golden years. But the war that made the world safe for democracy made the land perilous for agriculture.<sup>264</sup> "The initial shock of war in 1914 . . . brought an overnight collapse in the foreign sales of wheat and cotton . . ."<sup>265</sup> Wartime inflation, meanwhile, devastated purchasing power on the farm.<sup>266</sup> Even the substitution of diesel- and gas-driven mechanical power for horsepower was pinching the farmer: the systematic replacement of horses with farm machinery simultaneously raised farm yields, increased farmers' dependence on purchased inputs, and decreased demand for feed grains.<sup>267</sup> Many American farmers, especially wheat growers, were caught in a classic price squeeze.<sup>268</sup> depressed

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that a state milk pricing order violated the dormant Commerce Clause).

261. See Stern, *supra* note 210, at 901.

262. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

263. See 7 U.S.C. § 1301(a)(1)(c) (1994) (defining the "parity index," as of any date, as "the ratio of (i) the general level of prices for articles and services that farmers buy" as of that date "to (ii) the general level of such prices . . . during the period January 1910 to December 1914, inclusive"). For the intellectual origins of the parity principle, see GEORGE N. PEEK & HUGH S. JOHNSON, *EQUALITY FOR AGRICULTURE* (1922).

264. See generally BENJAMIN H. HIBBARD, *EFFECTS OF THE GREAT WAR UPON AGRICULTURE IN THE UNITED STATES AND GREAT BRITAIN* 22-67 (1919).

265. THEODORE SALOUTOS, *THE AMERICAN FARMER AND THE NEW DEAL* 3 (1982).

266. See A.B. Genung, *The Purchasing Power of the Farmer's Dollar from 1913 to Date*, 117 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (1925).

267. See SALOUTOS, *supra* note 265, at 6, 25.

268. See generally *FPC v. Conway Corp.*, 426 U.S. 271, 279 (1976); *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d 1373, 1376-77 (9th Cir. 1992); John E. Lopatka, *The Electric Utility Price Squeeze as an Antitrust Cause of Action*, 31 UCLA L. REV. 563 (1984).

demand and prices for their products, coupled with unbearable increases in the cost of living and production.<sup>269</sup>

The macroeconomic and political conditions of the 1920s and '30s tightened the vise. The forty million acres rushed into production upon American entry into World War I kept dumping huge grain harvests out of the Great Plains.<sup>270</sup> Foreign markets no longer offered a relief valve. Transformed by military victory from a global debtor into a creditor, the United States became a nation of importers. The rosy balance of payments made it extremely difficult to restore American agricultural exports to pre-war levels, much less to conquer new overseas markets.<sup>271</sup> Political instability in Europe razed several significant export markets. Crushed by brutal reparation obligations and hyperinflation, Germany hiked tariffs and subsidized domestic grain production.<sup>272</sup> Fascist Italy likewise closed its markets and propped up its growers.<sup>273</sup> Finally, the restructuring of Soviet agriculture all but barred imports.<sup>274</sup>

The American response did nothing to interrupt the global lurch toward awesome tariffs and agricultural autarky. Quite the opposite. The McNary-Haugen bills that nearly became law in 1927 and 1928 would have raised a tariff wall against agricultural imports in order to lift sagging domestic commodity prices.<sup>275</sup> Herbert Hoover's election ended the McNary-Haugen plan, but his administration implemented an even more ag-

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269. For an explanation of the "agricultural treadmill," the farm-flavored variant of the price squeeze, see WILLARD W. COCHRANE, *FARM PRICES: MYTH AND REALITY* 85-107 (1958); WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 378-95 (1979).

270. See SALOUTOS, *supra* note 265, at 3.

271. See, e.g., E. G. Nourse, *The Trend of Agricultural Exports*, 36 J. POL. ECON. 330 (1928); Rexford G. Tugwell, *The Problem of Agriculture*, 39 POL. SCI. Q. 549 (1924).

272. See Leo Pasvolksy, *International Relations and Financial Conditions in Foreign Countries Affecting the Demand for American Agricultural Products*, 14 J. FARM. ECON. 257, 260-62 (1932).

273. See *id.* at 262-63; N.W. Hazan, *The Agricultural Program of Fascist Italy*, 15 J. FARM ECON. 489 (1933).

274. See Mordecai Ezekiel, *European Competition in Agricultural Production with Special Reference to Russia*, 14 J. FARM ECON. 267, 271-73 (1932). But cf. U.S. DEPT OF COMMERCE, 1942 FOREIGN COMMERCE AND NAVIGATION OF THE UNITED STATES 5, 346 (1942) (reporting that the Soviet Union had resumed its role as a leading importer of American wheat and flour by the 1940s).

275. See Fite, *supra* note 238, at 657 (describing the McNary-Haugen plan from its inception in the "parity" movement to two vetoes by President Coolidge and its eventual death upon the election of President Hoover).

gressive plan of protectionism: the notorious Smoot-Hawley Tariff Act.<sup>276</sup> As retaliatory tariff barriers rose all over the world, America's "most disastrous single mistake . . . in international relations"<sup>277</sup> helped complete the rout in the wheat market. Domestic supplies soared, exports dried up,<sup>278</sup> and prices crashed.<sup>279</sup>

The passage and successful defense of the Agricultural Adjustment Act of 1938<sup>280</sup> enabled the Department of Agriculture to expand the policy underlying the 1936 soil conservation law: supply control. "The low prices [for wheat] were obviously the result of the excessive supply,"<sup>281</sup> and some constraint on production seemed inevitable in spite of farmers' traditional opposition to acreage restrictions.<sup>282</sup> Congress amended the 1938 Act to triple the penalty on excess wheat even as it offered greater price support.<sup>283</sup> The support mechanism was simple enough. By increasing the nonrecourse loan rate for wheat,<sup>284</sup> Congress guaranteed a higher minimum price for participating producers.<sup>285</sup> The wheat program would have delivered "an average price . . . of about \$1.16 a bushel," for the 1941 crop year, "as compared with the world market price of 40 cents a bushel."<sup>286</sup> To prevent the favorable price from gorging

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276. Act of June 17, 1930, ch. 497, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1202-1677k (1994)).

277. Richard N. Cooper, *Trade Policy as Foreign Policy*, in U.S. TRADE POLICIES IN A CHANGING WORLD ECONOMY 291, 291 (Robert M. Stern ed., 1987).

278. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) ("Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920s they averaged more than 25 per cent.").

279. See U.S. DEP'T OF AGRIC., AGRICULTURAL STATISTICS 10, 20, 22 (1942) (noting a two-thirds decline in wheat prices between 1929 and 1932 and additional price drops in 1938, 1940, and 1941); Stern, *supra* note 210, at 901 (same).

280. See *supra* notes 247-249 and accompanying text.

281. Stern, *supra* note 210, at 902.

282. See FITE, *supra* note 231, at 51-52.

283. See *Filburn*, 317 U.S. at 115-16.

284. See *id.* at 116 (noting that Congress had provided "for an increase in the loans on wheat to 85 per cent of parity").

285. See, e.g., *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981) (explaining how nonrecourse loan rates set minimum commodity prices).

286. *Filburn*, 317 U.S. at 126.



already overflowing stocks, the wheat program needed stiffer penalties on excess production.<sup>287</sup>

But this was no ordinary program for rationalizing the domestic distribution of a scarce commodity.<sup>288</sup> The wheat crisis assumed global proportions. In reviewing "the economics of the wheat industry," the *Filburn* Court began by surveying "[c]ommerce among the states in wheat."<sup>289</sup> This maneuver, reminiscent of Chief Justice Hughes's description of the breathtaking scale of the Jones and Laughlin Steel Corporation,<sup>290</sup> was a facile sleight of hand. Although other Supreme Court cases have hinged on the perceived need to maintain uninhibited domestic trade in wheat,<sup>291</sup> *Filburn* did not turn on the "large and important" traffic between the sixteen wheat-exporting states and their thirty-two wheat-importing counterparts.<sup>292</sup> The real problem was the "abnormally large supply of wheat" that throughout the 1930s had "caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion."<sup>293</sup> Domestic wheat stocks reached an all-time high in 1940.<sup>294</sup> In the halcyon days before World War I and the Great Depression, American farmers might have unloaded the wheat abroad. But tariff barriers erected throughout the 1930s had sealed off

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287. See *id.* at 116. Virtually every price support mechanism is paired with some sort of supply control. See J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 787-88 (1993).

288. The Court undertook this task in contemporaneous controversies over broadcast licensing. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945); *FCC v. National Broadcasting Co.*, 319 U.S. 239, 243 (1943); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940). See generally Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1431-40 (1995) (surveying this era's broadcasting cases).

289. 317 U.S. at 125.

290. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-28 (1937).

291. See *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 34-36 (1923); *Dahne-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290-92 (1922); *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 53-54 (1921); *Munn v. Illinois*, 94 U.S. 113, 131 (1877); cf. *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (describing "the various stockyards of the country as great national public utilities" that dominated "the flow of commerce from the ranges and farms of the West to the consumers in the East").

292. 317 U.S. at 125.

293. *Id.*

294. See Stern, *supra* note 210, at 901-02.

many overseas markets. Foreign aid programs such as Lend-Lease and general wartime increases in demand offered only modest and evanescent relief.<sup>295</sup>

*Filburn* showed that the United States' competitors and would-be customers matched the American response to the wheat crisis:

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Importing countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government. [Footnote:] It is interesting to note that all of these have federated systems of government, not of course without important differences. In all of them wheat regulation is by the national government.<sup>296</sup>

This is *Filburn's* forgotten footnote. To my knowledge, this passage linking the federal wheat program to the economic and legal conditions that prevailed in 1941 has attracted the attention of exactly one commentator, who reads this passage as supporting the proposition that a state ordinarily cannot "demand[] a price increase for its products."<sup>297</sup> But Justice Jackson's bombshell of a footnote communicates far more about the political economy of federalism. One forgotten footnote is worth a thousand Commerce Clause cases.

### C. SPACIOUS SKIES (WHERE YOUR MANIFEST DESTINY LIES)

*Filburn's* forgotten footnote tells us as much about wheat as it does about federalism. The roll call of leading exporters—Argentina, Australia, Canada, and the United States—tells us that wheat was being cultivated and exported around the world, suggesting that no country, much less a political subdivision, commanded substantial market power.<sup>298</sup> Yet this roster

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295. See U.S. DEP'T OF AGRIC., 1943 ANNUAL REPORT OF THE SECRETARY OF AGRICULTURE 135-36 (1944) (reporting increases in demand for wheat as grain, as animal feed, and as a base for alcohol).

296. 317 U.S. at 125-26 & n.27.

297. Charles H. Clarke, *Supreme Court Assault on the Constitutional Settlement of the New Deal*: Garcia and National League, 6 N. ILL. U. L. REV. 39, 39 (1986).

298. Market power, or the power to affect prices by manipulating supply, is virtually nil in a market populated by many competitors. See *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 119 & n.15 (1986); *Matsushita Elec. In-*

is truly striking not for its diversity, but for its similarity. Although three are predominantly Anglophone countries with English legal traditions,<sup>299</sup> Argentina's inclusion breaks any necessary link between federalism and the common law. What these countries share is *size*; the prevalence of English-speaking, common law societies shows nothing more than Great Britain's colonial prowess.<sup>300</sup> These are countries the size of continents, with vast, temperate plains that support not only massive agricultural exports, but also diverse, unruly populations that warrant federalist government.

"Some truths are so basic that, like the air around us, they are easily overlooked."<sup>301</sup> Federalism is a function of territory and terrain. We ought not to be surprised that geography has such a profound impact on economics and political organization. Throughout human history, a long east-west axis has facilitated the diffusion of goods and ideas—especially climate-dependent agricultural innovations—across a large land mass.<sup>302</sup> The geographic factors that promote or retard the spread of agriculture across a region are the very ones that modulate all other sorts of diffusion: of genes, languages, ideas.<sup>303</sup> Topography matters at least as much as size, probably more. Even if "[t]here is no particular constraint on the size" of "political communities," federalism emerges whenever "linguistic, religious, and cultural features" define a geographi-

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dus. Co. v. Zenith Radio Corp., 475 U.S. 574, 590 (1985); NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 112 (1984); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 & n.19 (1977). See generally William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

299. See generally, e.g., EDWIN R. BLACK, *DIVIDED LOYALTIES: CANADIAN CONCEPTS OF FEDERALISM* (1975); L.F. CRISP, *AUSTRALIAN NATIONAL GOVERNMENT* (4th ed. 1978); Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992).

300. Cf. Rubin & Feeley, *supra* note 154, at 908 & n.34 (attributing American federalism to the "now uninteresting details of eighteenth century British colonial administration" and the Australian and Canadian variants to "nineteenth century British colonial administration") (emphasis omitted).

301. *New York v. United States*, 505 U.S. 144, 187 (1992).

302. See JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 183-86 (1997) (hypothesizing that Eurasia's long east-west axis facilitated more rapid transmission of agricultural innovations than on other continents).

303. See Luigi L. Cavalli-Sforza, *Genes, Peoples and Languages*, 265 SCI. AM. 104 (1991); Luigi L. Cavalli-Sforza et al., *Reconstruction of Human Evolution: Bringing Together Genetic, Archaeological, and Linguistic Data*, 85 PROC. NAT'L ACAD. SCI. 6002 (1988).

cally distinct subcommunity within a population mass that is otherwise coherent enough to achieve meaningful political union.<sup>304</sup> More often than not, these differences arise from geographic isolation. Any attentive ear can detect the effect of hilly terrain on voices that vary between Swiss villages and between Boston neighborhoods. Centrifugal pressures are sure to splinter these otherwise compact communities. Size and topography also explain instances in which federalism does *not* arise. Internal geographic barriers have historically fragmented Europe beyond hope of a lasting union; a geographically integrated China long ago attained political unity and has never really broken apart.<sup>305</sup> Neither Europe nor China, though conducive to the diffusion of agriculture and other innovations, has ever achieved the sort of federal union found in *Filburn's* wheat-growing republics.

Another striking aspect of *Filburn's* forgotten footnote is the consensus that the wheat-exporting nations reached on the need "to protect the domestic price received by [wheat] producers."<sup>306</sup> The *Filburn* Court overstated the "important differences" among the support programs in the four leading countries. This much is evident from even a cursory reading of the forgotten footnote:

In Argentina wheat may be purchased only from the national Grain Board. A condition of sale to the Board, which buys at pegged prices, is the producer's agreement to become subject to restrictions on planting. The Australian system of regulation includes the licensing of growers, who may not sow more than the amount licensed, and who may be compelled to cut part of their crops for hay if a heavy crop is in prospect. The Canadian Wheat Board has wide control over the marketing of wheat by the individual producer. Canadian wheat has also been the subject of numerous Orders in Council. . . . [T]he Wheat Board [exercises] full control [over] sale, delivery, milling and disposition by any person or individual.<sup>307</sup>

These programs shared the basic strategy and structure of the Agricultural Adjustment Act of 1938: raise farm incomes by

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304. Rubin & Feeley, *supra* note 154, at 941-42 (using Catalonia's persistent independence within Spanish politics as an illustration of this phenomenon).

305. See DIAMOND, *supra* note 302, at 411-14. On federalism in China, see generally Tahirih V. Lee, *The Future of Federalism in China*, in *THE LEGAL LIMITS OF THE RULE OF LAW: CRITICAL REFLECTIONS ON CHINESE LEGAL CULTURE* (James Feinerman et al. eds., forthcoming 1997-1998); Alwyn Young, *The Razor's Edge: Distortions and Incremental Reform in the People's Republic of China* (1997) (unpublished manuscript, on file with author).

306. 317 U.S. at 126.

307. *Id.* at 126 n.27 (citations omitted).

coupling price support with stringent supply controls. Whether a government props commodity prices by extending nonrecourse loans<sup>308</sup> (as the United States did) or by making public purchases at a generous price<sup>309</sup> (as Argentina did) is immaterial. The crucial point, again, is similarity: four wheat-exporting nations with diverse legal traditions nevertheless developed practically identical agricultural policies.

It is easy enough to understand why plans to support wheat prices and wheat farmers' incomes "generally evolved towards control by the central government."<sup>310</sup> The existence of a global market for wheat but not milk explains why price and income support in the dairy industry can be a state-law enterprise, while comparable programs for wheat cannot. But the question remains why Argentina, Australia, Canada, and the United States adopted wheat programs at all. The parallel adoption of wheat support programs was primarily a function of domestic politics. The simultaneous emergence of punitive tariffs and ruinous price and income support programs around the world serves as a prime example of the prisoner's dilemma.<sup>311</sup> Farmers threatened by the destructive macroeconomic situation of the 1930s successfully bargained vis-à-vis the disorganized mass of consumers for an expensive support package.<sup>312</sup> GATT being but a dim, distant vision past the immediate concerns of a world at war, only national courts stood between each country's agricultural policy and the staggering collective loss in social welfare that would result from the implementation of this special-interest legislation.

So why did the Supreme Court uphold the wheat program in *Filburn*? A comparably discriminatory price support scheme adopted by an American state, based on "customs duties [and]

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308. See *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981) (explaining how nonrecourse loan rates set minimum commodity prices).

309. See *Swift & Co. v. United States*, 257 F.2d 787, 790-92 (4th Cir. 1958) (explaining how government purchases set minimum commodity prices), *cert. denied*, 358 U.S. 837, 901 (1958).

310. *Filburn*, 317 U.S. at 126.

311. See generally Glenn W. Harrison et al., *Costs of Agricultural Trade Wars*, in *MACROECONOMIC CONSEQUENCES OF FARM SUPPORT POLICIES* 330 (Andrew B. Stoeckel et al. eds., 1989) (providing a game-theoretic analysis of this phenomenon).

312. See Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565, 1571 (1995).

regulations" designed to exclude competitors,<sup>313</sup> would flagrantly violate the *dormant* Commerce Clause. The retaliatory tariffs of the 1930s and 1940s would have constituted "the paradigmatic Commerce Clause violation";<sup>314</sup> the worldwide cry that "farmers . . . must be protected against competition from without, lest they go upon the poor relief lists or perish altogether," spelled "a speedy end" to global "solidarity."<sup>315</sup> It bears remembering that Chief Justice Rehnquist chided the *West Lynn* majority for striking down a Massachusetts milk pricing order that was only slightly less transparently protectionist than the scheme invalidated by "the ill-starred opinion in *United States v. Butler*."<sup>316</sup>

The answer, of course, is that the Constitution neither directs nor permits the Supreme Court to subject *federal* statutes to a supervening norm of *international* free trade.<sup>317</sup> Deferential review of federal legislation under the Commerce Clause, the very doctrine for which *Filburn* has become mythically famous, has no more bite than due process review of state economic regulation. *Filburn* could no more have struck down the Agricultural Adjustment Act of 1938 on Commerce Clause grounds than *Nebbia v. New York*<sup>318</sup> could have invalidated New York's milk pricing statute on due process grounds.<sup>319</sup> However much the theory of comparative advantage urges "that the peoples of the [world] must sink or swim together, . . . that in the long run prosperity and salvation are in

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313. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539 (1949).

314. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 203 (1994).

315. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935); cf. KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 62 (1995) ("If patriotism is . . . the last refuge of the scoundrel, wrapping outdated industry in the mantle of national interest is the last refuge of the economically dispossessed.").

316. *West Lynn*, 512 U.S. at 216 (Rehnquist, C.J., dissenting) (citing *United States v. Butler*, 297 U.S. 1 (1936)).

317. *But cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 438 & n.9 (1980) (stating that dormant "Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged"); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 96 (1984) (plurality opinion) (same).

318. 291 U.S. 502 (1934).

319. *See FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583 (1942) (equating state and federal powers to fix commodity prices); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394 (1940) (same); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 569-71 (1939) (same).

union and not division," the American Constitution is too "parochial in range" to reach such global concerns.<sup>320</sup>

In short, although *Filburn's* wheat problem demonstrated the maturity of American federalism, it also exposed a yawning gap. In a more primitive union, under less sophisticated economic conditions, agricultural distress would have prompted uprisings by farm-dominated factions or even entire states. Shay's Rebellion of 1786-87 and the Whiskey Rebellion of 1794 were relatively minor uprisings;<sup>321</sup> the Civil War was the paradigmatic example of agrarian revolt.<sup>322</sup> Thanks to the "common market" created by the Constitution,<sup>323</sup> the flow of wheat within America was never in doubt. The real problem, evidently shared by Argentina, Australia, and Canada, was the inability of the national political process to respond intelligently to demands for price and income support. No legislature anywhere in the world could break the cycle of retaliatory tariffs and ruinous domestic supports. Despite their size and federal structure, the world's great wheat-growing republics succumbed to the simple ailment called client politics.<sup>324</sup>

Agricultural policy across the interwar world presaged the political sclerosis that would eventually mark the decline of Western social democracies.<sup>325</sup> The wheat crisis of the early twentieth century proved too big even for the federalist systems of the largest wheat-exporting countries. Like its counterparts, the United States Congress awaited a *deus ex ma-*

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320. *But see Baldwin*, 294 U.S. at 522-23.

321. *See, e.g., United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 226 (1984) (Blackmun, J., dissenting); *Duncan v. Kahanamoka*, 327 U.S. 304, 320-21 (1946).

322. *Cf. Chen, supra* note 229, at 1299 ("In 1861 the South seceded, claiming for itself the political fruits that the farmer-dominated Constitutional Convention had not delivered.").

323. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 423 (1994) (Souter, J., dissenting) (describing "the Commerce Clause's overriding requirement of a national common market" (internal quotations marks omitted)); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (same); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977) (same).

324. *See generally* J.Q. WILSON, *THE POLITICS OF REGULATION* 368-69 (1980) (defining "client politics" as the likely result "[w]hen the benefits of a prospective policy are concentrated but the costs widely distributed").

325. *See* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 153-59 (1971) (describing the rent-seeking, welfare-destroying political behavior that occurs when a concentrated lobby stands to reap the potential benefits and the potential costs are distributed across the population at large).

china that would arrive only after world war proved the peacekeeping value of free trade. The trade wars typified by the Smoot-Hawley Tariff Act did not subside until the Bretton Woods series of postwar economic talks,<sup>326</sup> and the specific types of trade at issue in *Filburn* would defy multilateral liberalization until the end of the Uruguay Round.<sup>327</sup> Though the story of agriculture and GATT lies outside this Article's scope,<sup>328</sup> this glimpse suffices to show how *Filburn* might be more profitably studied as a prologue to the emergence of global economic federalism than as a postscript to the New Deal's transformation of American federalism.<sup>329</sup>

#### D. THE NATURE OF THE FARM

One final strand remains in this revisionist narrative. The wheat program upheld in *Wickard v. Filburn* had distinct distributional consequences within the United States. True, there were no visible disruptions of internal traffic in wheat. Nor were there drastic wealth transfers, aside from the usual insult of "lev[ying] the heaviest taxes against poorer people to subsidize mainly richer farmers."<sup>330</sup> Roscoe Filburn himself symbol-

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326. A 1944 conference in Bretton Woods, N.H., led to the establishment of three leading institutions designed to regulate international economic relations: GATT, the International Monetary Fund, and the International Bank for Reconstruction and Development (also known as the "World Bank"). See generally KENNETH W. DAM, *THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM* (1982); Gerald M. Meier, *The Bretton Woods Agreement—Twenty-Five Years After*, 39 STAN. L. REV. 235 (1971); Andreas F. Lowenfeld, *Is There Law After Bretton Woods?*, 50 U. CHI. L. REV. 380 (1983) (reviewing DAM, *supra*).

327. See Agreement on Agriculture, opened for signature April 15, 1994, in URUGUAY ROUND, *supra* note 22, at 39.

328. See generally TIMOTHY E. JOSLING, STEFAN TANGERMANN & T.K. WARLEY, *AGRICULTURE IN THE GATT* (1996); Al J. Daniel, Jr., *Agricultural Reform: The European Community, the Uruguay Round, and International Dispute Resolution*, 46 ARK. L. REV. 873 (1994); Jon G. Filipek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 123 (1989); Liane L. Heggy, *Free Trade Meets U.S. Farm Policy: Life After the Uruguay Round*, 25 LAW & POL'Y INT'L BUS. 1367 (1994); Jimmye S. Hillman, *Agriculture in the Uruguay Round: A United States Perspective*, 28 TULSA L.J. 761 (1993); Jeffrey J. Steinle, Note, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333 (1995).

329. Cf. PETER H. IRONS, *THE NEW DEAL LAWYERS* 293 (1982) (describing *Filburn* as "[t]he last of the New Deal cases").

330. Robert Tempest Masson & Philip M. Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 S.D. L. REV. 662, 663 (1978). See generally Jim Chen, *The American Ideology*, 48



ized the biggest class of losers. Farms like his Ohio homestead—farms “maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs” in addition to cultivating “a small acreage of winter [or spring] wheat”<sup>331</sup>—have become virtually extinct in the half-century since the Supreme Court last heard and rejected a constitutional challenge to a statute regulating farm prices and incomes. Such are the quirky consequences of agricultural rent-seeking.

The story of *Filburn*’s role in restructuring rural America begins, once again, with the recognition of wheat’s incredible versatility. Wheat differed from the other commodities in New Deal agricultural controversies—cotton, tobacco, and milk—in that many wheat producers could either sell their crop or use the crop on the farm as animal feed.<sup>332</sup> In this respect, wheat more readily resembled corn. Whereas a “regulation of the quantity of” tobacco reaching warehouses or cotton reaching gins would control “virtually the entire supply” of these commodities,<sup>333</sup> eighty-five percent of the corn produced in the Corn Belt during the 1930s moved in commerce in the guise of corn-fed livestock, poultry, or their milk or egg byproducts.<sup>334</sup> A smaller but comparable portion of the wheat crop was likewise converted into meat, milk, poultry, or eggs. Consumption of wheat “on the farm where grown appear[ed] to vary in an amount greater than 20 per cent of average production.”<sup>335</sup> On-farm wheat consumption would defeat a simpler supply control strategy, for integrated farmers could evade a marketing quota merely by redirecting grain to the feeding bin.<sup>336</sup> Congress thus decided to treat corn and wheat “alike with respect to the feeding of poultry or livestock for market.”<sup>337</sup>

Filburn’s farm activities reflected the larger wheat market. Contrary to the widespread myth that Roscoe Filburn con-

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VAND. L. REV. 809, 860-62, 875 (1995) (outlining the distributive case against using higher food prices to boost farmers’ incomes).

331. *Filburn*, 317 U.S. at 114.

332. See *supra* text accompanying note 253-260.

333. Stern, *supra* note 210, at 902.

334. See H.R. REP. NO. 75-1645, at 24 (1937); Stern, *supra* note 210 at 902.

335. *Filburn*, 317 U.S. at 127.

336. See J.B. Hutson, *Acreage Allotments, Marketing Quotas, and Commodity Loans as Means of Agricultural Adjustment*, in U.S. DEPT OF AGRIC., YEARBOOK OF AGRICULTURE, 1940: FARMERS IN A CHANGING WORLD 551, 555 (1940); Stern, *supra* note 210, at 903.

337. S. REP. NO. 76-1668, at 2 (1940), quoted in Stern, *supra* note 210, at 902.

verted his excess wheat into home-baked loaves of bread,<sup>338</sup> he either stored the wheat for seed in a future, perhaps more profitable growing season or, more likely, converted wheat into milk, meat, poultry, and eggs. This transformation of a field crop into refrigerated grocery staples requires nothing more mysterious than the feeding of farm animals.<sup>339</sup> The Filburn farm engaged in an age-old practice of regulated firms:<sup>340</sup> manipulating investments between a regulated line of business (wheat) and nonregulated lines (meat, dairy, poultry, and eggs). The Department of Agriculture responded in an equally time-honored fashion by treating each wheat farmer's total acreage in wheat as a workable surrogate for the "impossible task" of "computing the actual quantity of wheat marketed by each farmer in the form of wheat or meat."<sup>341</sup> Reliance on acreage limitations allowed the wheat program to control prices

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338. See, e.g., *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1130 (7th Cir. 1995) (describing *Filburn* as a case involving a "farmer's consumption of bread baked from [his] own wheat"), *cert. denied*, 115 S. Ct. 2579 (1995); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (citing *Filburn* for the proposition "that wheat a farmer bakes into bread and eats at home is part of 'interstate commerce'"), *cert. denied*, 513 U.S. 930 (1994). See generally Merritt, *supra* note 184, at 748-49 & n.316 (debunking the myth that "Farmer Filburn was . . . an organic home baker who had decided to raise wheat for a few loaves of bread"). Indeed, the image of Filburn as an enthusiastic consumer of home-baked bread boggles the mind. To consume the 239 excess bushels he harvested in July 1941, see *Filburn*, 317 U.S. at 114, Filburn and his family would have had to consume nearly 48 one-pound loaves of bread each day for a year. (This computation is based on the assumption that one bushel of wheat yields 73 one-pound loaves of bread. See Kansas Wheathearts Educational Website (visited Sept. 1, 1997) <<http://www.hpij.com/wsdocs/whearts/whearts.htm>>. In 1944, farmers fed 20 times more wheat to livestock than they ground into flour for home use. See USDA, FIELD AND SEED CROPS BY STATES, 1949-54, at 8 (1957) (Stat. Bull. No. 208) [hereinafter FIELD AND SEED CROP REPORT]. One gets the impression that the purveyors of *Filburn*'s myth never actually read the Supreme Court's opinion.

339. This act, and not the tilling of crop fields, may have been the first step in the development of agriculture. See Constance Holden, *Bringing Home the Bacon*, 254 SCIENCE 1398 (1994).

340. See, e.g., *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *City of Houston v. Southwestern Bell Tel. Co.*, 259 U.S. 318 (1922); *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

341. Stern, *supra* note 210, at 903. Ironically, another office within the Department of Agriculture, the Federal Extension Service, was exhorting American farmers to feed as much of their wheat crop to livestock, ostensibly to beef up the protein profile of America's wartime diet, but not coincidentally to ease the wheat glut. See U.S. DEPT OF AGRIC., ANNUAL REPORT OF THE SECRETARY OF AGRICULTURE 69, 80 (1941).

and supply not only in the market for the regulated commodity, but also the conditions in a derivative product market.

What has come to be known as *Filburn's* myth of "aggregation" was in fact the whopping economic impact of many simultaneous, uncoordinated acts by a nation of vertically integrated, diversified wheat producers. Just as there was no way in *Currin v. Wallace* to separate tobacco destined for domestic versus international markets,<sup>342</sup> and no way in the New Deal's milk marketing cases to identify distinct intrastate and interstate markets,<sup>343</sup> the on-farm versatility of wheat made it impossible to distinguish wheat consumed on the farm from wheat sold on the open market. The only difference was that the tobacco warehouse in *Currin* seemed more tangible than the global wheat market in *Filburn*; a single warehouse is more obviously "the throat where tobacco enters the stream of commerce."<sup>344</sup>

To be sure, neither *Filburn* nor any other farmer acting alone exercised enough power to affect the national market merely by deciding either to sell wheat or to consume it by integrating wheat production with other on-farm activities. *Filburn* had to take the market price as he found it; finding the price less than fully satisfactory, he sought an alternative use for his wheat. Such "price taking" has been the farmer's lot in a world dominated by agribusiness purchasers.<sup>345</sup> But *Fil-*

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342. See *Currin v. Wallace*, 306 U.S. 1, 11 (1939) ("[T]he transactions on the tobacco market were conducted indiscriminately at virtually the same time, and in a manner which made it necessary, if the congressional rule were to be applied, to make it govern all the tobacco thus offered for sale.").

343. See *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 120-21 (1942); *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 568-69 (1939). Contemporaneous dormant Commerce Clause cases disputed the extent to which milk was crossing state lines. Compare *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) (condemning a state milk-pricing statute as raising "a barrier to traffic between one state and another as effective as if customs duties . . . had been laid upon the thing transported") with *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346, 353 (1939) (observing that "[o]nly a small fraction [of milk] produced by farmers in Pennsylvania is shipped out of the Commonwealth").

344. *Mulford v. Smith*, 307 U.S. 38, 47 (1939); cf. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 35 (1937) (using a similar "throat" metaphor to describe an impediment to interstate commerce); *Stafford v. Wallace*, 258 U.S. 495, 516 (1922) (same).

345. See *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 825-26 (1978) (describing the "price taking" that occurs when farmers in an almost perfectly competitive market must sell to concentrated agribusiness purchasers); *id.* at 829 (Brennan, J., concurring) (same); *id.* at 840 (White, J.,

burn's seemingly discrete act, multiplied across a large population of farmers, profoundly affected prices and supplies in the larger market for wheat. "Untouched, unassailable, undefiled, that mighty world-force, that nourisher of nations, wrapped in Nirvanic calm, indifferent to the human swarm, gigantic, resistless, moved onward in its appointed grooves."<sup>346</sup> When coupled with relatively inelastic demand for wheat as food and seed,<sup>347</sup> on-farm consumption packed the wallop of wheat sales on the Board of Trade, where even the pre-New Deal Court easily discerned that "[s]ales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."<sup>348</sup> Congress emphatically had the power to regulate these transactions.

Constitutional correctness aside, what were the practical consequences of *Filburn* and the commodity program it upheld? Only a farm like Filburn's, one integrating grain production with livestock or poultry operations, could freely switch between selling wheat on the open market, storing it to await higher prices, and feeding it to farm animals. As the *Filburn* Court recognized, however, there were vast regional differences in farm organization. In the wheat-exporting states of the West and Midwest, many farmers "specializ[ed] in wheat, . . . the concentration on this crop reache[d] 27 per cent of the crop land, and the average harvest [ran] as high as 155 acres."<sup>349</sup> By contrast, some states in New England—a net wheat-importing region and the cradle of the American family farm<sup>350</sup>—devoted "less than one per cent of the crop land . . . to wheat" and harvested "less than five acres per farm."<sup>351</sup> As a rule, larger farms specializing in wheat marketed their har-

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dissenting) (same); *Tigner v. Texas*, 310 U.S. 141, 145 (1940) (same).

346. FRANK NORRIS, *THE OCTOPUS: A STORY OF CALIFORNIA* 360 (Doubleday & Co. rpt. 1947) (1901).

347. See *Filburn*, 317 U.S. at 127 ("The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant."); Stern, *supra* note 210, at 904.

348. *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 40 (1923); cf. *Santa Cruz Fruit Packing Co. v. NLRB*, 310 U.S. 453, 464 (1938) (detecting readily "a continuous flow of interstate commerce" in a stream of "fruits and vegetables . . . grown in California" and shipped entirely within that state).

349. *Filburn*, 317 U.S. at 126-27.

350. See Taylor, *supra* note 232, at 476-80; cf. MARK KRAMER, *THREE FARMS: MAKING MILK, MEAT, AND MONEY FROM THE AMERICAN SOIL* 20, 38-42 (2d ed. 1987) (describing the especially tenuous economic position of New England farmers).

351. *Filburn*, 317 U.S. at 127.

vests, while smaller, integrated farms used wheat for purposes ranging from animal feed to "a nurse crop for grass seeding" to a mere "cover crop to prevent soil erosion and leaching."<sup>352</sup> Thanks to the uneven geographic distribution of wheat specialists versus integrated farmers, the program upheld in *Filburn* systematically shifted wealth away from smaller, integrated farms in the East (including Ohio) and toward larger, specialized farms in the West. A political system based on proportional representation might muster some opposition to such a transparently regional wealth transfer,<sup>353</sup> but one cannot expect this sort of resistance in a federalist nation that enshrines geographic representation in its Senate.<sup>354</sup>

The *Filburn* Court was fully aware of the shadow that the Agricultural Adjustment Act was casting on traditional American agriculture. Justice Jackson explicitly acknowledged that wheat which "is never marketed . . . supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market."<sup>355</sup> There is no better statement in *United States Reports* of Ronald Coase's Nobel Prize-winning observation that vertical integration and open-market purchases are flip sides of the same economic phenomenon.<sup>356</sup> The *Filburn* Court even recognized how the wheat program might have "forc[ed] some farmers into the market to buy what they could provide for themselves" and therefore served as "an unfair promotion of the markets and prices of specializing wheat

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352. *Id.* This portion of *Filburn* unequivocally gives the lie to the New Deal's fraudulent characterization of wheat as a "soil-depleting" crop. See *supra* text accompanying note 246.

353. Cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) ("The exigencies of the nation may require that . . . treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed.").

354. See, e.g., Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997); William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENTARY 213 (1995); cf. *Reynolds v. Sims*, 377 U.S. 533, 571-77 (1964) (refusing to extrapolate any constitutional significance from the geographically based organization of the United States Senate).

355. *Filburn*, 317 U.S. at 128.

356. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 388, 392 (1937). Only one federal court has ever cited *The Nature of the Firm*. See *Herzog Contracting Corp. v. McGowen Corp.*, 976 F.2d 1062, 1067 (7th Cir. 1992) (citing Coase as indirect support for the proposition that "[c]ommon ownership of corporations is designed in part to bring transactions within the affiliated group that would otherwise have been made with unrelated firms").

growers.”<sup>357</sup> The wheat program had precisely this effect: from 1944 to 1954, the proportion of the American wheat market that was consumed on the farm where it was grown fell from 16 to 10 percent.<sup>358</sup> As the Court eventually concluded in its dormant Commerce Clause cases, however, “neither half of the commerce clause protects the particular structure or methods of operation in a . . . market.”<sup>359</sup> Confronted with the plea that the wheat program was favoring Western monocultures over Eastern family farmers’ integrated operations, the Court pleaded judicial impotence: “with the wisdom, workability, or fairness, of [this] plan of regulation we have nothing to do.”<sup>360</sup> Though *Filburn* is often lauded, and rightly so, as an emblem of judicial deference to the superior expertise and accountability of legislative decisionmakers, this aspect of the opinion “follow[s] the example of Pontius Pilate, . . . for two thousand years . . . the condemnable paradigm of terminal leave from judgment.”<sup>361</sup>

What then, after *Filburn*, is truth?<sup>362</sup> You shall know the truth, and the truth shall set you free.<sup>363</sup> The agricultural

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357. 317 U.S. at 129.

358. The following chart illustrates the decline of on-farm consumption of wheat after *Wickard v. Filburn*:

Date	Seed <sup>†</sup>	Feed <sup>†</sup>	Food <sup>†</sup>	Sold <sup>†</sup>	On-Farm Percentage
1944	63,934	104,011	5409	886,757	16.35%
1945	63,980	98,876	4470	940,297	15.11%
1946	69,039	88,406	3861	990,812	14.00%
1947	72,244	94,766	4023	1,187,878	12.59%
1948	73,046	98,020	3475	1,120,370	13.48%
1949	60,686	84,984	2903	949,842	13.53%
1950	65,478	74,222	2836	876,808	13.98%
1951	66,194	66,663	2639	852,665	13.71%
1952	68,704	64,860	2576	1,170,300	10.42%
1953	53,216	65,167	2410	1,052,278	10.30%
1954	47,862	49,639	2191	884,208	10.13%

<sup>†</sup> in thousands of bushels

See FIELD AND SEED CROP REPORT, *supra* note 338, at 8.

359. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127 (1978); accord *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93-94 (1987).

360. 317 U.S. at 129.

361. MILNER S. BALL, *THE WORD AND THE LAW* 138 (1993).

362. See *John* 18:38.

statute upheld in *Filburn* accelerated the destruction of the very type of farmer who lost this monumental case. Shortly after *Filburn*, agricultural analysts were seriously asking the question that Coase had posed to students of industrial organization: "Why is not all production carried on by one big firm?"<sup>364</sup> By 1957, Harvard economists invented a new word, *agribusiness*, to describe "the sum total of *all* operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them."<sup>365</sup> Marginal farms folded, average farm size mushroomed, and industry began performing "virtually all [the] operations relating to growing, processing, storing, and merchandising food and fiber" that had been "a function of the farm."<sup>366</sup> And so vertical integration *on* the farm yielded to vertical integration *of* the farm. There is but a vowel's difference between the *firm* and the *farm*;<sup>367</sup> the nature of the firm dictates the destiny of the farm.<sup>368</sup>

In fairness to the regulators who devised the Agricultural Adjustment Act of 1938 and the Justices who upheld it, the demolition of the traditional farm economy was probably inevitable. "Whatever the government did or did not do, it seemed certain by the late 1940s and 1950s that the decline in the number of farms and farmers was irreversible."<sup>369</sup> The social, economic, and technological changes wrought by world war ordained as much. Full deployment of mechanical power, fertilizer, and pesticides has sustained the flow of cheap grain since World War II.<sup>370</sup> Abundant and cheap, purchased feed has all

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363. See *John* 8:32.

364. Coase, *supra* note 356, at 394.

365. JOHN H. DAVIS & RAY A. GOLDBERG, A CONCEPT OF AGRIBUSINESS 2 (1957) (emphasis added).

366. *Id.* at 1; see also *id.* at 4 (describing traditional agriculture "as more or less a self-contained industry," characterized by "typical farm famil[ies]" that "produced [their] own food, fuel, shelter, draft animals, feed, tools, and implements and most of [their] clothing").

367. See Chen & Adams, *supra* note 229, at 402 (equating concerns about "farm size" with concerns about "firm size").

368. Cf., e.g., Andrew P. Barkley, *The Determinants of the Migration of Labor out of Agriculture in the United States, 1940-85*, 72 AM. J. AGRIC. ECON. 567, 571 (1990) (evaluating the impact of higher nonfarm wages on exodus from farming); Yoav Kislev & Willis Peterson, *Prices, Technology, and Farm Size*, 90 J. POL. ECON. 578, 579 (1982) (noting that increasing urban incomes prompt farmers to exit and leaves a landscape of fewer, larger farms).

369. FITE, *supra* note 231, at 123.

370. See DAVID GOODMAN & MICHAEL REDCLIFT, REFASHIONING NATURE:

but displaced home-grown grain and shifted a correspondingly large proportion of the American livestock population from pastures and the range to feedlots.<sup>371</sup> In the half-century after the war, the farm population of the United States fell from roughly twenty-five percent of the total to less than two percent.<sup>372</sup> But *Filburn* and the commodity programs it blessed surely hastened the fading of the agrarian dream. The scholarly consensus is that federal intervention has exacerbated the inequities of the modern agricultural economy.<sup>373</sup> For a program whose "major objectives have been to preserve or restore existing structures or conditions," the agricultural policy of the United States has failed even on its own economically dubious terms.<sup>374</sup> The intended beneficiaries of the New Deal have the bitterest view of its agricultural legacy. The self-appointed advocates of small American farmers have neither forgotten nor forgiven the federal government's apparent complicity in the rout; the agrarian left has uniformly condemned post-Depression farm programs for aggravating the trend toward fewer, larger, more industrialized farms.<sup>375</sup> "Hell has no fury like a duped agrarian."<sup>376</sup>

Comparing *Filburn* with *United States v. Carolene Products*,<sup>377</sup> decided only four years earlier, reveals the proper place of these agricultural cases in the constitutional canon. Indeed, the most important lessons from each case can be reduced to two footnotes, one celebrated and the other thoroughly ne-

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FOOD, ECOLOGY, AND CULTURE 109-10 (1991).

371. See *id.*; JAMES R. SIMPSON & DONALD E. FARRIS, *THE WORLD'S BEEF BUSINESS* 37, 51 (1982).

372. See Chen & Adams, *supra* note 229, at 381 & n.129; Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 218-20 (1993).

373. See generally Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994) (reviewing the economic and legal literature).

374. D. Gale Johnson, *U.S. Agricultural Programs as Industrial Policy*, in *INDUSTRIAL POLICY FOR AGRICULTURE IN THE GLOBAL ECONOMY* 307, 308 (S.R. Johnson & S.A. Martin eds., 1993).

375. See, e.g., MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 131-34 (1988); INGOLF VOGELER, *THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE* 170-85 (1981). For a guide to the arcane distinctions between left and right within the agricultural community, see generally Curtis E. Beus & Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 RURAL SOCIOL. 590 (1990).

376. Chen, *supra* note 329, at 846.

377. 304 U.S. 144 (1938).



glected. *Carolene Products'* famous footnote<sup>378</sup> foretells the trampling of underrepresented consumer interests in the special interest state.<sup>379</sup> *Filburn's* forgotten footnote shows how federalism, a function of the physical geography of nations, not only failed to rescue the United States from a global wheat crisis but also expedited a controversial and probably unintended redistribution of domestic wealth. The two cases expose serious structural shortcomings that modern constitutional doctrine has not vanquished. *Carolene Products* adopted a faulty model of judicial review, while *Filburn* proved the limits of a federalism that stretches from sea to shining sea, but no further. In other words, whereas *Carolene Products* confounds Alexander Hamilton's logic in the Seventy-eighth Federalist Paper, *Filburn* undermines James Madison's confidence in the giant republic of the Tenth Federalist Paper.<sup>380</sup> Both phenomena arise from the problems of public choice and the same transaction cost analysis that generated Ronald Coase's foundational works on law and economics, *The Problem of Social Cost*<sup>381</sup> and *The Nature of the Firm*.<sup>382</sup>

Perhaps we can be rescued by the myth of *Wickard v. Filburn*. The post-*Darby* Supreme Court, after all, vindicated central authority in *Filburn* by upholding Congress's power to defeat self-dealing. That power proved sufficient to undo Roscoe Filburn's decision to plant twelve extra acres of wheat, but wavered in the face of the farm lobby's power politics during the New Deal. Far from lamenting "centripetal forces" in federal systems, as Professor Friedman would have us do,<sup>383</sup> we should celebrate the regular reassertion of central authority.<sup>384</sup> The centripetal abasement of state sovereignty is what allows

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378. See *id.* at 153 n.4.

379. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397; see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

380. Compare THE FEDERALIST NO. 78 (Hamilton) with THE FEDERALIST NO. 10 (Madison).

381. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

382. See Coase, *supra* note 356.

383. See Friedman, *supra* note 120, at 365-78.

384. Cf. Rubin & Feeley, *supra* note 154, at 909 ("The Supreme Court should never invoke federalism as a reason for invalidating a federal statute or as a principle for interpreting it.").

a central authority to save any federation's states from themselves and their incurably corrupt political processes. Centripetal supremacy, not centrifugal subsidiarity, should be the animating principle in all systems of federalism.<sup>385</sup> *Filburn's* failure, if indeed it can be called a failure, did not lie in overstating Congress's power to regulate interstate commerce. Rather, it lay in the failure of the United States and its trading partners to establish a worldwide system of economic cooperation before World War II proved the value of free trade.

Far beyond merely facilitating the efficient allocation of a political union's collective resources, federalism profoundly affects the *distribution* of wealth *within* the union's constituent states. So obvious a point should not have escaped our attention, but unfortunately it has. Replacing hollow political theory with an awareness of practical consequences represents the first step toward a true understanding of the law and economics of federalism.

## V. THE NATURE OF THE STATE

Our romantic image of federalism is "a throwback to a time of true heroes, not of the brittle, razzle dazzle boys that had sprung up around the jack rabbit ball—a natural not seen in a dog's age."<sup>386</sup> But a realistic view of history will surely erase such sweetness and light. More than even baseball, federalism has been "the great American tragedy."<sup>387</sup> Federalism has always grown out of war. The first economic war among the newly independent American states "was the immediate cause that led to the forming of a [constitutional] convention";<sup>388</sup> the second led to a bloodbath and constitutional reform of cataclysmic

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385. *But see* Treaty on European Union, Feb. 7, 1992, art. 3b, 31 I.L.M. 247 (limiting actions by the European Union "[i]n areas which do not fall within its exclusive competence" to only those matters that "cannot be sufficiently achieved by the Member States").

386. BERNARD MALAMUD, *THE NATURAL* 169 (1952).

387. *Flood v. Kuhn*, 407 U.S. 258, 264 (1972) (quoting George Bernard Shaw).

388. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring in the judgment); *accord* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1595 (1997); *see also* *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7 (1986) (describing the desire "to avoid the tendencies toward economic Balkanization that had plagued" the colonies and doomed the Articles of Confederation as an "immediate reason for calling the Constitutional Convention"); *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (same).

proportions. *Filburn*, for its part, foreshadowed by its failure a new birth of economic freedom for the First World. By these measures, the race to outbid other states for baseball teams and chopstick factories scarcely warrants the hyperbolic label of "war." Economic interdependence have made real secession and real civil war utterly unthinkable.<sup>389</sup>

If history's various economic wars—real, rhetorical, and otherwise—teach us anything, it is the enduring value of free trade. The common market established by the Constitution is one of the most important baselines in American law.<sup>390</sup> Though heavily laden with economic and political values worth protecting by constitutional means,<sup>391</sup> free trade too often is obscured by the obsession with state sovereignty that is America's national neurosis.<sup>392</sup> State sovereignty and the traditional vision of American federalism have their champions,<sup>393</sup> but free trade has the greater claim to being an underenforced, undervalued constitutional norm.<sup>394</sup> The most effective guarantor of free trade within the United States, the dormant Commerce Clause rests on the assumption that residual federal power over contrary local legislation should be asserted even in the absence of congressional action.<sup>395</sup> "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*."<sup>396</sup>

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389. Cf. Rubin & Feeley, *supra* note 154, at 947 ("Nebraska and New Jersey are not going to break away from the United States, and we will continue to debate and decide the issues that confront us as a single polity.").

390. See, e.g., *Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994) (describing the "securing [of] a national area of free trade" as the "central objective" of the dormant commerce clause (internal quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977) (same); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) (same).

391. See Collins, *supra* note 142.

392. See Rubin & Feeley, *supra* note 154, at 908.

393. See, e.g., Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207 (1994).

394. See generally Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

395. See, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769-70 (1945) (noting that "Congress has undoubted power to redefine the distribution of power over interstate commerce" but that "in general Congress has left it to the courts to formulate the rules" case by case); *South Carolina Hwy. Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938) (noting that "[t]he commerce clause, by its own force prohibits discrimination against interstate commerce" (emphasis added)).

396. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983); accord *Transcontinental Gas Pipe Line Corp. v. State Oil &*

The usual justification for centralized judicial review of local economic legislation is *horizontal*; it seeks to guarantee equality among competitors without regard to state citizenship and to force recalcitrant states to bestow their privileges and immunities on residents and outsiders alike.<sup>397</sup> International trade law often reduces this concern to the shibboleth of "fairness" among competitors.<sup>398</sup> American constitutional law is no different; conventional dormant Commerce Clause jurisprudence stresses separation of powers as its principal *institutional* concern and horizontal equality as its principal *normative* goal. Critics fret about the weakness of the doctrine's constitutional basis,<sup>399</sup> but the Court nevertheless persists in protecting out-of-state competitors<sup>400</sup> and the national market at large.<sup>401</sup> Judicial intervention is especially likely when a state is stupid enough to codify its discriminatory designs in geographic terms, or too effective in exporting costs. The inconsistencies in the cases have arguably resulted from the col-

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Gas Bd., 474 U.S. 409, 422 (1986); cf. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (subjecting a state statute to a fatal equal protection analysis even though Congress had already waived any dormant commerce clause objections to the state law).

397. See U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); cf. Matthew Adler, *What States Owe Outsiders*, 20 HAST. CONST. L.Q. 391 (1992).

398. See, e.g., Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1, 7-14 (1996) (noting the rhetorical prominence of "fairness" in debates over international trade); Robert E. Hudec, *Mirror, Mirror on the Wall: The Concept of Fairness in United States Trade Policy*, in CANADA, JAPAN, AND INTERNATIONAL LAW 1990, at 88 (same).

399. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring in the judgment); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429-35 (1982); Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 571-73, 582-90.

400. See, e.g., *South Carolina Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177, 185 n.2 (1938); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1851); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 133.

401. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality opinion) (striking down an Iowa trucking regulation that was "out of step with the laws of all other Midwestern and Western States"); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 526-30 (1959); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773-74 (1945); cf. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 407 (1994) (O'Connor, J., concurring in the judgment) (citing "the potential for conflicts" among the "many jurisdictions [that] are contemplating or enacting flow control" as a reason for striking down a local flow control ordinance) (emphasis added).

lision between institutional fears over this doctrine's weak constitutional pedigree and a normative preference for open markets.

To rationalize this jurisprudential morass, we can enlist Ronald Coase's comprehensive theory of firms, the market, and the law. On the sixtieth anniversary of Coase's first great breakthrough, let us base a more comprehensive economic theory of federalism on *The Nature of the Firm*. Despite relative inattention from courts and constitutional scholars, Coase's 1937 masterpiece is widely acknowledged as the foundational work for modern theories of industrial organization. We constitutionalists have missed an obvious but devastating analogy: federalism follows structures and patterns akin to those of vertical integration and coordination by private firms. Decisions to delegate and assume sovereign authority bear more than a passing resemblance to the vertical mergers, price restraints, and territorial restrictions targeted by antitrust law—the very interactions that shape the nature of the firm.<sup>402</sup> What the United States is unwilling or unable to do on its own, it may delegate downward to its constituent states or concede upward to one of the multinational arrangements to which it belongs. The stunning question that Coase used to revolutionize the study of industrial organization can now be rephrased in public law terms: Why is there ever more than one sovereign, and only one, in the world?

Unlike a private firm, the entrepreneurial sovereign faces at least three options for minimizing its own costs: integration within some system of federalism, open-market purchases, and coercive regulation of the market.<sup>403</sup> The interaction between the second and third options illustrates how government simultaneously operates in two interrelated markets: the market for goods and services, and the market for votes and campaign contributions.<sup>404</sup> This is the true sense in which "States simply are different from private parties and have a different role to

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402. *But cf.* *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 n.8 (1981) (declining to endorse the "view that the Commerce Clause injects principles of antitrust law into the relations between the States").

403. *Cf.* *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 99 (1984) (plurality opinion) (noting that a state can "support" an in-state "processing industry by selling only to [in-state] processors, by vertical integration, or by direct subsidy").

404. For merely one illustration of the interplay between these markets, see Oliver E. Williamson, *Franchise Bidding for Natural Monopolies—In General and with Respect to CATV*, 7 BELL J. ECON. & MGMT. SCI. 73 (1976).

play" in the constitutional scheme.<sup>405</sup> Government's unique power to subsidize inefficient transactions through coercive taxation or regulation explains the distinction between the proprietary and regulatory capacities of government,<sup>406</sup> and why the law "treats state action differently from private action" in the latter setting.<sup>407</sup> As private firms must choose between vertical integration and open-market purchases, so too governments must choose between direct subsidization of public works "through general taxes or municipal bonds" and the constitutionally suspect alternative of "discriminatory regulation."<sup>408</sup> The traditional American preference for such alternatives as public utility regulation over direct public ownership<sup>409</sup> merely reflects the relatively high political cost of transparent public decisions to tax and spend. As agency costs and the transaction costs of negotiating contracts are to private firms, so are the flaws of the political marketplace to governments. Whereas "firms[] arise to minimize transaction costs in production," "the whole federalist institutional structure of the state might be formed to minimize the transaction costs of making collective decisions."<sup>410</sup>

In short, free trade as federalism's primary economic dividend looks different when viewed through the twin lenses of industrial organization and public choice. These are the economic subdisciplines that shed the greatest light on the mythshrouded mysteries of *Wickard v. Filburn*, and we have no reason to doubt their explanatory power in other settings. Future studies would do well to add these items to the economic toolkit already used to dissect federalism: the theory of comparative advantage, game theory, and certain other aspects of positive political theory. Coase's model of industrial organization describes government and federalism at least as well as it does private firms and vertical integration, and public choice ex-

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405. Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, 475 U.S. 282, 290 (1986).

406. See Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

407. *Gould*, 475 U.S. at 290.

408. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994); see also *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (expressing a similar preference for general revenue taxes or municipal bonds).

409. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 181-83 (1982).

410. MUELLER, *supra* note 163, at 73 & n.13. See generally Gordon Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19 (1969).

plains the presence and significance of the additional transaction costs in the state's economic calculus.

Some economic sophistication of this sort already permeates American case law. In the two decades since the Privileges and Immunities Clause and the market-participant doctrine burst into the modern constitutional imagination, the high court's cases have come to reflect (albeit slowly and unsystematically) a more sophisticated understanding of the nature of the state. By immunizing a generous number of state activities from dormant Commerce Clause review, the Court at first invited states to buy the right to discriminate. "Put your money where your discriminatory mouth is," the Court all but said in *Hughes*<sup>411</sup> and *Reeves*,<sup>412</sup> "and we shall blind ourselves to your bias." One cannot miss the striking parallels to Derrick Bell's bitter critique of antidiscrimination law<sup>413</sup> and to the Court's later endorsement of Congress's use of its purse to evade constitutional limits on the enumerated powers of the federal government.<sup>414</sup>

At first the Court ignored local governments' efforts to project their regulatory powers downstream. Even subcontractors, though formally one degree of privity removed from a locality's proprietary involvement, were considered "in a substantial if informal sense" to be "working for the city."<sup>415</sup> The Court crafted the constitutional equivalent of antitrust law's safe harbor for intraenterprise conspiracies.<sup>416</sup> The unexpected revival of the Privileges and Immunities Clause marked the beginning of the Court's growing awareness of state and local governments' power over certain markets,<sup>417</sup> and soon a plural-

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411. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

412. *See Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

413. *See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 8-9 (1992).

414. *See South Dakota v. Dole*, 483 U.S. 203 (1987).

415. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 211, n.7 (1983).

416. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); *cf. Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29 (1962) (declining to give legal effect to de minimis "organizational distinctions").

417. *See United Bldg. & Constr. Trades Council v. City of Camden*, 465 U.S. 208, 221 (1984) (holding that the governmental "exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause," even though the same conduct would be immunized by the market-participant doctrine from commerce clause review).

ity of Justices adopted a sharp distinction between a state's lawful efforts to limit its purchases or sales to its own residents and a state's unlawful efforts to impose downstream restraints on subsequent transactions.<sup>418</sup> By the time the Court extended its First Amendment restraints on political patronage to cases involving independent contractors,<sup>419</sup> the jurisprudential reversal seemed complete. Even the transformation of the Contracts Clause from a limitation on regulation to a limitation on legislative interference with public contracts appeared to reflect the Justices' growing appreciation of the pitfalls of "bargaining with the state."<sup>420</sup>

In the end, the case law seems to have settled on a distinction between ordinarily lawful subsidies and ordinarily unconstitutional efforts to discriminate through taxation or regulation. This evidently stable legal position embodies an instinct well grounded in public choice and the political economy of lawmaking. Because a subsidy or direct "market participation" with the state's own limited funds is *transparent* and can be countered by the ordinary political process, courts are more willing to tolerate discrimination in proprietary, or "vertically integrated," acts of state than discrimination via coercive taxation or regulation.<sup>421</sup> Some "significant group of . . . citizens . . . can be counted upon to use their votes to keep [government] from raising [any] tax excessively."<sup>422</sup> The

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418. See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984) (plurality opinion); cf. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 n.6 (1982) (describing a ban on electricity exports from a state as "more than regulat[ion of] the use of a resource [the state] assertedly owns").

419. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996); *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342 (1996).

420. Compare *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (upholding a state law regulating private contracts) and *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983) (same) with *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (striking down a state's attempt to repeal a covenant in a contract between itself and holders of bonds issued by that state). See generally RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* (1994).

421. See Coenen, *supra* note 38, at 479; Collins, *supra* note 142, at 103; Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1098, 1138 (1988); Wells & Hellerstein, *supra* note 406, at 1129, 1131; cf. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 211-12 (1994) (Scalia, J., concurring in the judgment) (recognizing this political limitation on state power but refusing to rely upon it in agreeing to invalidate a targeted subsidy scheme).

422. *Washington v. United States*, 460 U.S. 536, 545 (1983); accord *West Lynn Creamery*, 512 U.S. at 200; *South Carolina v. Baker*, 485 U.S. 505, 525



same cannot be said of less easily detected regulatory intrusions into the marketplace. International economic law implicitly acknowledges the power of political transparency by exempting "procurement by governmental agencies of products purchased for governmental purposes" and "payment of subsidies exclusively to domestic producers, including . . . subsidies effected through governmental purchases" from GATT's "national treatment" provisions.<sup>423</sup> Similarly, in the context of the Minneapolis Manifesto, American constitutional law should be prepared to tolerate interjurisdictional competition for sports franchises and other businesses, but only to the extent that the boondoggles are transparent and capable of being patrolled by the political process.

Filtered through the lens of economic analysis, federalism has transcended its traditional classification as a constitutional law subject. Even as public utility regulation has been analyzed as a species of taxation,<sup>424</sup> trade law, domestic or international, is also a species of taxation. Debates over central supremacy versus state subsidiarity in federalism are thinly veiled debates over tax policy. Protectionist schemes such as those illustrated by *Carbone*, *West Lynn*, and *Filburn* display local, state, and federal regulators in their full glory "as tax collector[s] *par excellence*."<sup>425</sup> Ideally, judicial enforcement of a free trade norm would soften the protectionist blow on the groups least likely to defend themselves through the political process. A fully informed economic vision of structural issues in constitutional law must therefore acknowledge federalism as merely one of many variations on the overriding theme of public law: taxing and spending in the special-interest state.

This invigorated view of federalism as a fiscal engine deserves to be stretched to its logical conclusion. Like many another constitutional debate that "has degenerated into . . . deadlock" within a stifling "equal protection paradigm,"<sup>426</sup> the conventional, fairness-based vision of federalism is intellectually bankrupt. "Fair," to mince no words, is foul. In either its

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n.15 (1988).

423. GATT 1947, *supra* note 22, art. III.8.

424. See Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

425. Chen, *supra* note 14, at 1046; cf. ELI WINSTON CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 526 (1950) (assigning the title of "tax collectors *par excellence*" to public utility companies).

426. Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1843 (1996).

affirmative or its dormant manifestation, "[t]he Commerce Clause . . . is less concerned with protecting the rights of interstate businesses than with preserving an appropriate balance between state and federal powers and, in particular, with precluding states from efforts to channel or distort interstate economic activity."<sup>427</sup> It is far past time to adopt an explicitly *vertical* approach to federalism, with political transparency as the primary *institutional* concern and the same redistributive instincts that underlie progressive taxation as the primary *normative* goal. By deemphasizing the horizontal aspects of fairness—equality between trading partners, between outsiders and citizens within any participating jurisdiction—and stressing in their stead the vertical notions of fairness as between rich and poor, as between the politically dominant and the disenfranchised, the economically informed study of federalism can defend free trade as a norm that promotes both the efficient allocation of wealth and its equitable distribution.

Admittedly, a vertical approach to federalism will lower the comfort level in this field, for the law and economics movement has largely adhered to the dogma that "economics does not answer the question whether [any given] distribution of income and wealth is good or bad."<sup>428</sup> But struggle we must. We are unlikely to advance the debate by revisiting questions of allocation when no one disputes the theory of comparative advantage but many would limit free trade out of concern for its impact on organized labor and the environment.<sup>429</sup> It is not the maximization of local welfare but the dispersion of local wealth that puts the fire into the Minneapolis Manifesto's debate over stadium subsidies. Or, as Coase stated the point, "problems of welfare economics must ultimately dissolve into a study of aesthetics and morals."<sup>430</sup>

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427. Enrich, *supra* note 71, at 468.

428. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2, at 14 (4th ed. 1992). *But cf. id.* §§ 16.1-16.7, at 455-77 (reconsidering the blanket assertion that economic analysis has nothing to say about the distributional desirability of a certain law); Chen & Gifford, *supra* note 106, at 1362 (suggesting that law and economics has answered most of the allocative questions available and must therefore turn to distributional questions).

429. See North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480; North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499; 19 U.S.C. § 3311(b)(2) (1994) (incorporating these so-called side agreements into NAFTA); *id.* § 3471 (labor standards); *id.* § 3472 (environmental standards).

430. Coase, *supra* note 381, at 43.

Economic analysis tends to universalize theories of federalism. Regardless of the political context of any specific federal system, the model of comparative advantage will raise similar allocative questions, and the implicit questions of tax policy embedded in federalist structures will raise familiar distributive questions time and again. The inexorable political tendency to shift costs onto unrepresented or structurally ineffective groups persists everywhere. The geographic scope of a federalist system is subordinate to the geographic footprint of the market that the governments in question wish to subsidize. In *Carbone*, *West Lynn*, and *Filburn* alike, a local jurisdiction—Clarkstown, Massachusetts, the United States—exploited a legally imposed restraint of trade to redirect consumer dollars to favored producers, in lieu of a much more politically expensive program relying solely on direct subsidies financed by general tax revenues. In the two dormant Commerce Clause cases from 1994, a national tribunal was able to spare local consumers and redirect public spending decisions back to a more politically accountable forum. By contrast the New Deal Commerce Clause jurisprudence perfected in *Filburn* ratified Congress's last step toward American agricultural autarky. The difference lies in the territorial reach of the governments involved vis-à-vis the scope of the market at issue, not in any intrinsic difference in kind between the two sides of Commerce Clause jurisprudence or between domestic and international systems of federalism.

Having committed ourselves to the economic equivalent of an "integrative" jurisprudence that synthesizes political, moral, and historical evidence,<sup>431</sup> we should welcome open exchange in domestic and international perspectives on the primordial constitutional question called free trade. In a world filled with distinct but structurally comparable federal systems, let us march toward a unified field theory of federalisms, in the plural.<sup>432</sup> The race to the bottom, interstate externalities, and the

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431. See Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779 (1988).

432. See, e.g., *Irvin v. Dowd*, 359 U.S. 394, 408 (1959) (Frankfurter, J., dissenting); *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1020 (1993); Bednar, *supra* note 115; Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992); Christopher K. Leman & Robert H. Nelson, *The Rise of Managerial Federalism: An Assessment of Benefits and Costs*, 12 ENVTL. L. 981, 984 (1982); Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in*

intractable problems of public choice in the special-interest state have replaced separation of powers as the principal institutional concerns animating federalism—anywhere, anytime. What we call federalism lies at the heart of every vertical distribution of governmental power, whether downward from the United States to its constituent states and their political subdivisions,<sup>433</sup> or upward from sovereign nations to the still expanding framework of the World Trade Organization. The “experience” of other federal systems “may . . . cast an empirical light on the consequences of different solutions to a common legal problem,” especially “the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.”<sup>434</sup> To move beyond the realm of baseball and boondoggles, to advance the agenda of the Minneapolis Manifesto and the mission of the Minnesota School of Federalism, we must confess the diminished significance of American constitutional law. In a world of falling frontiers, any national system of public law shows merely a single face of farm team federalism.

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*Offshore Oil and Gas Development*, 11 *ECOLOGY* L.Q. 401, 404 (1984); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2432 (1991); John Minor Wisdom, *The Frictionmaking, Exacerbating Political Role of Federal Courts*, 21 *SW. L.J.* 411, 411-12 (1967).

433. See Briffault, *supra* note 132.

434. *Printz v. United States*, 117 S. Ct. 2365, 2405 (1997) (Breyer, J., dissenting).

